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Supreme Court of the United States

October Term, 1992

A-ABART ELECTRIC SUPPLY, INCORPORATED, an Illinois corporation, and RUBEN, KAPLAN & ROSEN AND JOHN W. BOYLES, counsel for A-Abart Electric Supply, Incorporated,

Petitioners,

vs.

EMERSON ELECTRIC COMPANY, (BUILDER PRODUCTS DIVISION), a Missouri corporation and LITTMAN BROTHERS ENERGY SUPPLIES, INCORPORATED, an Illinois corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX THERETO

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QUESTIONS PRESENTED FOR REVIEW

I. A manufacturer, as here, in the process of establishing new dealerships to sell and market its new product line of ceiling fans (priced to sell at substantially lower prices than that customarily being paid by ceiling fan dealers for comparative ceiling fans of another major ceiling fan manufacturer) solicits and agrees to accept the Petitioner (an established ceiling fan dealer with 5 retail store outlets in the Chicagoland area) as one of its dealers and agrees to sell its new ceiling fan product line to Petitioner.

Then, at the special insistence and request of another newly solicited dealer (whose 11 retail store outlets in the Chicagoland area penetrate the entire Chicagoland ceiling fan market and make it the principal competitor of Petitioner),the manufacturer enters into an agreement, understanding and conspiracy with said other new dealer whereby said manufacturer, as a condition of said other new dealer buying said manufacturer's new product line of ceiling fans, agrees with said other dealer not to sell, and refuses to sell, its new product line of ceiling fans to Petitioner (thereby foreclosing the Petitioner from an important and vital segment of the supplier market for which there has been no substitute given the fact that the manufacturer's new ceiling fan product line is priced substantially lower than the comparative ceiling fans of another major ceiling fan manufacturer who is the principal supplier of Petitioner).

The principal question presented for review is whether such concerted refusal by the manufacturer to sell its new product line of ceiling fans to the Petitioner, by reason of said agreement between the manufacturer and the other dealer, constitutes, under the facts and circumstances disclosed by the record, an unlawful and unreasonable restraint of trade in "per se" violation of Section 1 of the Sherman Act (15 U.S.C. § 1)?

An ancillary question presented for review is whether said concerted refusal to sell its new product line of ceiling fans to the Petitioner, under the circumstances disclosed by this record, would likewise be violative of § 1 of the Sherman Act even if judged under the "rule of reason"?

II. Does the Supreme Court's decision in *Business Electronics v. Sharp Electronics,* 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988), the facts of which can be clearly distinguished from the facts and circumstances present in the instant cause, operate as a bar to petitioner's antitrust action in the instant cause?

III. What are the proper guidelines for determining whether a particular restraint of trade may constitute a "per se" violation of the Sherman Act? And in that regard, is it the fact that a particular restraint in form is a "horizontal restraint," or a "vertical restraint," Or a "hybrid restraint," operating at both a horizontal and vertical level? Or is the proper test the anticompetive nature and effect of the restraint involved, and the fact that it has no redeeming economic feature or reason to justify its existence?

IV. Does the Supreme Court's decision in *Business Electronics v. Sharp Electronics,* 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988), stand for the proposition that, absent price fixing or a price fixing agreement, a "vertical" restraint cannot under any circumstances constitute a "per se" violation of § 1 of the Sherman Act?

And if so, does not such proposition or position put an unrealistic, undesirable and artificial shackle on the legitimate growth and development of federal antitrust law?

V. Whether the respondent, Littman, even regardless and separate and apart from the antitrust aspects involved, has by

its conduct in relation to the Petitioner (under the facts and circumstances herein detailed) been guilty of unfair competition and the tort of wrongful interference with Petitioner's prospective economic advantage, and therefore answerable to Petitioner in damages therefor?

VI. Whether the District Court and the Court of Appeals erred in sustaining Respondent Emerson's Motion For Summary Judgment on Count II of Petitioner's Complaint, given the fact that the Illinois Supreme Court, as far back as 1894, in the case of *Cross v. Weare Commision Co,* 153 Ill. 499 (1894), recognized as part of Illinois law, the doctrine of promissory or equitable estoppel as a defense to the application of the statute of frauds?

VII. Was Petitioner's and Petitioner's counsel appeal to the Court of Appeals frivolous, and did the Court of Appeals err in imposing sanctions against Petitioner and its counsel under Rule 38 of the Federal Rules of Appellate Procedure for the United States Court of Appeals?

Did the District Court err in imposing Rule 11 sanctions against Petitioner and its counsel?

PARTIES TO THE PROCEEDINGS BELOW

A-Abart Electric Supply, Inc., an Illinois corporation, Petitioner herein, was the Plaintiff in the District Court proceedings below (under Case No 88 C 10759), and the Plaintiff-Appellant in connection with two (2) appeals in the Court of Appeals docketed under Case No. 90-3751 and Case No. 91-2221, and consolidated by the Court of Appeals.

The law firm of Ruben, Kaplan & Rosen, and John W. Boyles, Petitioners herein, were the counsel for A-Abart Electric Supply, Inc. in the proceedings below, and Appellants in connection with Court of Appeals Case No. 91-2221 (consolidated by the Court of Appeals with Case No. 90-3751).

The Respondents in this action, and the Defendants-Appellees below, are Emerson Electric Company (Builders Products Division), a Missouri corporation, and Littman Bros. Energy Supplies, Inc., an Illinois corporation.

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OPINIONS AND ORDERS BELOW

In the proceedings in the District Court below, the following Motions for Summary Judgment were filed by the respective parties:

(1) Petitioner's (A-Abart) Amended Motion for Partial Summary Judgment against the Respondents (Emerson and Littman) on Count I of Petitioner's Complaint, on the issue of liability (Appendix M).

(2) Petitioner's (A-Abart) Motion for Partial Summary Judgment against Respondent (Littman) on Count III of Petitioner's Complaint, on the issue of liability (Appendix N).

(3) Respondent's (Emerson) Motion for Summary Judgment against A-Abart on Counts I and II of Petitioner's Complaint.

(4) Respondent's (Littman) Motion for Summary Judgment against A-Abart on Counts I and III of Petitioner's Complaint.

On November 30, 1990, the District Court below entered a final Judgment Order and Memorandum Opinion (Appendix F):

(1) Denying Petitioner's Motion for Partial Summary against the Respondents (Emerson and Littman)on Count I of Respondent's Complaint;

(2) Granting the Motions for Summary Judgment of the Respondents (Emerson and Littman) against the Petitioner (A-Abart), on Count I of Petitioner's Complaint;

(3) Denying Petitioner's Motion for Partial Summary Judgment against the Respondent (Littman), on Count III of Petitioner's Complaint, on the issue of liability;

(4) Granting the Motion for Summary Judgment of the Respondent (Littman) against the Petitioner (A-Abart), on Count III of Petitioner's Complaint;

(5) Granting the Motion for Summary Judgment of the Respondent (Emerson) against the Petitioner (A-Abart) on Count II of Petitioner's Complaint; and

(6) Dismissing with prejudice Petitioner's cause in its entirety.

On February 20, 1991 the District Court entered an Order granting Respondents' (Emerson and Littman) Motions for Sanctions pursuant to Rule 11, and on May 21, 1991 entered an Order (*see* Appendix J) imposing the following Rule 11 sanctions against Petitioner and its counsel, to-wit: (i) imposing a $2,500 fine against counsel for Petitioner; (ii) awarding the Respondent (Littman) attorney's fees in the amount of $2,159; and (iii) awarding the Respondent (Emerson) attorney's fees in the amount of $2,286. *See also,* Appendix H and I.

Petitioner's appeal from the District Court's Order of November 30, 1990 was filed on December 12, 1990 (Appendix G), and was docketed in the Court of Appeals under Docket No. 90-3751.

Petitioner's appeal from the District Court's Order of May 20, 1991 was filed May 28, 1991 (Appendix K), and was docketed in the Court of Appeals under Docket No. 91-2221.

The opinion and order sought to be reviewed is the opinion

and order of the United States Court of Appeals for the Seventh Circuit, in cases 90-3751 and 91-2221, consolidated, decided February 27, 1992, before Wood, Jr., Coffesy and Kanne, Circuit Judges (Appendices A and B). Petitioner's Petition for Rehearing (Appendix C), filed on March 11, 1992, was denied on April 23, 1992 (Appendix D).

Said opinion and order of the Court of Appeals affirmed the judgment of the District Court, and, as supplemented by further Order dated April 23, 1992 (Appendix E) imposed Rule 38 sanctions against counsel for Petitioner, by way of fees and costs, in the amount of $15,654,53 in favor of the Respondent (Emerson), and in the amount of $8,177.75 in favor of the Respondent (Littman).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutes, rule and constitutional provisions involved in this proceeding are as follows:

Section 1 of the Sherman Act, 15 U.S.C. § 1; Rule 11 of the Federal Rules of Civil Procedure; Paragraph 7 of the Advisory Committee Notes to the 1983 Amendment of Rule 11; Rule 38 of the Federal Rules of Appellate Procedure for the United States Court of Appeals; and the First and Fifth Amendments to the Federal Constitution. The pertinent provisions of each are reproduced in Appendix O, *infra*.

STATEMENT OF JURISDICTION

The Judgment Order of the Court of Appeals was entered on February 27, 1992 (Appendix A). A timely Petition for Rehearing was filed by the Petitioners on March 11, 1992 (Appendix C). which Petition for Rehearing was denied on April

23, 1992 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, A-Abart Electric Supply, Inc. ("A-Abart") filed a three-count Complaint in the District Court against Emerson Electric Company ("Emerson") and Littman Brothers Energy Supplies, Inc. ("Littman").

Count I alleged that both Emerson and Littman violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Count II charged Emerson with breaching a contract to sell A-Abart 552 ceiling fans and related accessories. Count III charged Littman with tortious interference with A-Abart's contractual relations with Emerson and with A-Abart's prospective economic relationship with Emerson.

Jurisdiction of the Court of Appeals was predicated on 28 U.S.C. § 1291. Jurisdiction of the District Court was predicated on 28 U.S.C. § 1331 (federal question, 28 U.S.C. § 1332 (diversity of citizenship), and the pendent jurisdiction of the District Court.

A-Abart moved for partial summary judgment (on the issue of liability) against Emerson and Littman on Count I, and for partial summary judgment (on the issue of liability) against Littman on Count III; reserving the question of damages on Counts I and III for future determination. Emerson moved for summary judgment against A-Abart on both Counts I and II. Littman moved for summary judgment against A-Abart on both Counts I and III.

The essence of Count I of Petitioner's Complaint is that Emerson, the manufacturer of a new line of ceiling fans having the same characteristics as the competitive Delta II and other

Casablanca line of ceiling fans sold by the Casablanca Fan Company (but being sold by Emerson at substantially lower prices than the Petitioner and other fan dealers were then paying for the Casablanca line of fans), and Littman, the principal competitor of Petitioner in the Chicago Metropolitan area, have entered into an unlawful agreement and conspiracy between themselves wherein Emerson, by way of a concerted refusal to deal, agreed not to sell, and has refused to sell, said new line of ceiling fans to the Petitioner notwithstanding the fact that Emerson, prior to its entry into such agreement and conspiracy, initially solicited Petitioner to become a dealer and distributor of said Emerson ceiling fan line, and sells said line of ceiling fans to Littman and other fan dealers in the Chicago Metropolitan area who compete with Petitioner in the sale of ceiling fans.

Petitioner has five (5) retail store outlets in the Chicago area at which it sells its ceiling fans at: 3744 W. Fullerton Avenue, Chicago, Illinois; 1492 Waukegan Road, Glenview, Illinois; 407 Dundee Road, Buffalo Grove, Illinois; 1073 N. Salem Drive, Schaumburg, Illinois; and 2897 Ogden Avenue, Lisle, Illinois. Commencing with its one store on Fullerton Avenue in 1982, Petitioner had been gradually expanding its store outlets (with the Lisle store being added early in 1989).

Littman is the principal competitor of the Petitioner, with some eleven (11) retail store outlets in the Chicago area at which it sells ceiling fans, to-wit: two (2) stores in Chicago proper, and one store each in the bordering suburbs of Highland Park, Schaumburg Downers Grove, Arlington Heights, Morton Grove, Homewood, Burbank, Oak Park and Orland Park. Littman's stores bracket and penetrate the entire Chicago area market for ceiling fans, a fact testified to by Richard E. Weber (the then national sales manager of Emerson).

On October 18, 1988, Emerson, through said Richard E.

Weber, its national sales manager, in the company of James J. Ippolito (its Chicago area sales representative), solicited the Petitioner, at the latter's Chicago office, to purchase and become a distributor and dealer of a new line of ceiling fans being manufactured by Emerson. At said meeting Mr. Weber represented to Sargon Malik, the President of the Petitioner company, as follows:

> (a) That Emerson's new line of ceiling fans used the same type of motor (a model K-55 electric motor initially manufactured by Emerson for and sold to the Casablanca Fan Company of California for use in the fans manufactured by the latter firm), and had the same characteristics as the Delta II and other Casablanca lines of ceiling fans manufactured and sold by the Casablanca Fan Company, and would therefore be in direct competition with the Casablanca line of ceiling fans then carried by Petitioner (which Casablanca fans constituted the principal line of fans carried and sold by Petitioner).
>
> (b) That Emerson was pricing its new line of ceiling fans at substantially lower prices then the Petitioner and other fan dealers were then paying for the Casablance line of fans, so that if Petitioner did not carry the new Emerson line of ceiling fans, the Petitioner would be at a competitive disadvantage; given the fact that the Casablanca line of ceiling fans constituted the principal line of ceiling fans carried by the Petitioner.

Corroborating the aforesaid is the following uncontroverted excerpted testimony of Richard E. Weber (the than national sales manager of Emerson), as to what he (Weber) said at the meeting of October 18, 1988 (as reflected at pages 21-28 of his evidence deposition,cand set forth at pp. 86-90 of the Appendix filed in the Court of Appeals,and Appendix M-1 herein):

"Q. How did the pricing of the new Emerson ceiling fan line that you have talked about, how did that compare with the pricing, if you know, of the Casablanca line of fans? A. It would be priced under Casablanca. Slightly under. Within oh, depending upon the model, was anywhere from I would say roughly twenty-five to fifty to seventy-five dollars.

Q. Less? A. Yes. To a dealer.

* * *

Q. (by Mr. Kaplan) What about the price factor? A. The price factor would enable a dealer such as Mr. Malik or others to sell the fan at a good profit margin and say its as good or similar to Casablanca and somewhat move up into the low end of Casablanca pricing; therefore they would be able to take, since there was a fifty or so dollars difference, they would make the entire margin and sell it at the bottom end."

* * *

Q. Do you know of your own knowledge whether the typical markup available to a dealer selling the premium line of EMERSON fans would be greater, for example, then the markup of comparative Casablanca fans? If you know. A. EMERSON's price was a new product, so you could add more profit onto it. Casablanca's lowest priced fan, I think it's the Delta II, I guess is the one we would be talking about, had been on the market for a number of years and there had been a lot of competition on it. Casablanca would not change their price structure, so the only way that a dealer could make inroads or get more market share was to lower

his profit margin on that product. And that's what had been happening. And since that was sort of the median range where most people bought fans, then a dealer would make less profit selling one of those fans than if he could be selling an Emerson Premium fan, which he would have purchased for less, and basically say it's very similar to Casablanca and has five blades, has the same basic motor, and you can sell it for the low end price of the Delta II, therefore the dealer would make, should make a considerably greater markup.

Q. Okay, Would it be correct to say the statement you just made outlining those various features were statements that you as sales manager when you — when you talked to potential dealers that those factors were pointed out to the potential dealers just as you pointed out the same today? A. Yes, they are basically true selling points which could be construed by looking at the prices that Emerson had, and those dealers which sold Casablanca would know what they were paying for it and how little margin they were making, so for them it became a quick matter for them to evaluate; yes, I can make more selling one Emerson versus one Casablanca.

At said meeting of October 18, 1988, Emerson acting through Mr. Weber, presented to Mr. Malik of the Petitioner company a brochure which had been prepared in advance by Emerson, setting forth the prices and terms at which Emerson was agreeable to selling its ceiling fan line to Petitioner; and the Petitioner, through Mr. Malik, its President, agreed to become a dealer and distributor of Emerson's line of ceiling fans, and Emerson, acting through Mr. Weber (its then national sales manager) agreed to

sell its line of ceiling fans to the Petitioner at the prices set forth in Emerson's Distributor Price Sheets. In furtherance of said agreement and understanding, Emerson furnished Petitioner with various brochures, literature and other promotional materials, and the Petitioner, at the request of Emerson's sales representative (James Ippolito), filled out and furnished to Emerson a "New Account Confidential Credit Information" Sheet, and a sales tax information sheet. In addition, Emerson sent and delivered to Petitioner a number of sample Emerson fans, and on November 18, 1988, the Petitioner, at the solicitation of Mr. Ippolito, placed and delivered to Mr. Ippolito, the local sales representative of Emerson, an initial ceiling fan purchase order (on a form that had been provided by Emerson) for some 552 Emerson ceiling fans and related accessories; at which time said sales representative verbally assured Petitioner that delivery of at least part of the Emerson ceiling fan order would be made by Emerson in time for the 1988 Christmas season.

Corroborating the aforesaid is the following excerpted testimony of Mr. Weber:

> Q. Now, was there any reason why you or Mr. Ippolito approached A-Abart? A. Yes. It was my job to secure distribution, limited distribution or best distribution in each city in the United States. By hiring Mr. Ippolito, he was my local expert, he was the person who knew who were the key players in the Chicago market. Mr. Ippolito deals mainly with lighting showroom type perople or fan dealers and he had dealt with Mr. Malik previous to that so him and I put together what we call a plan of action as to which key players would fit together and give us coverage of the Chicago market and achieve our sales goals.

> Q. Mr. Ippolito recommended that you attempt to get A-Abart into the fold, right? A. Yes. Sir.

Thereafter, on or about December 7, 1988, Mr. Malik, the President of Petitioner, was advised in person by Mr. Ippolito, the sales representative of Emerson, that although he (Ippolito) had accepted said order, Emerson had decided not to honor the order or to sell to Petitioner, since Emerson had now agreed to sell to Littman, the Petitioner's competitor, to the exclusion of the Petitioner.

Prior thereto, on September 8, 1988, at a meeting held at Littman's principal Chicago office, Emerson solicited Littman as a possible dealer and distributor of Emererson's new line of ceiling fans. At said meeting, Benson Littman (the President of Littman) asked Patrick Sly (the then Vice President of the Sales and Marketing Special Products Division of Emerson) what dealers or distributors would be carrying the Emerson ceiling fan line in the Chicago area, and was told that Emerson would be calling on everybody and would then make its decision back at corporate headquarters in St. Louis. Benson Littman then advised the Emerson people that if Emerson was going to be calling on A-Abart that Littman would not be interested in carrying the Emerson ceiling fan line. This is reflected in the following uncontroverted excerpts from the deposition testimony of Benson Littman, to wit):

> A. Our position was that if there was — if they were going to be calling on A-Abart Electric that we would not be interested in carrying the line.
>
> Q. Did you give them a reason for it? A. We probably said that we would not be willing to commit the resources necessary to bring a new product to market if — if we couldn't get our — if there wasn't going to be enough market

share. [*Page 71 of Benson Littman's deposition.*]

* * *

Q. Who brought up the name of A-Abart?

* * *

A. I believe it was us. [*Page 84 of Benson Littman's deposition.*]

* * *

On November 30, 1988, at an afternoon meeting held at Emerson's offices in St. Louis attended by representatives of Emerson and by Benson Littman and Daniel Littman (on behalf) of Littman), Emerson, despite objections theretofore raised both by Mr. Weber (Emerson's then national sales manager) and Mr. Ippolito (Emerson's Chicago area sales representative), entered into an agreement, understanding and conspiracy wherein Emerson, at the insistence of Littman and as a "condition" of Littman buying from Emerson, agreed not to sell its ceiling fan line to A-Abart. Evidencing the aforesaid are the following uncontroverted excerpts from the evidence deposition of Mr. Weber, the then national sales manager of Emerson (reflected at pages 58 to 63 of his evidence deposition, and pp. 98-103 of the Appendix filed in the Court of Appeals and Appendix M-1 herein):

> Q. Now lets get to this meeting in the afternoon of November 30th. This meeting was held at Emerson's office, right? A. Yes.
>
> Q. And who was present at this meeting? A. Myself. Jim Ippolito, Jane Smith, Pat Sly, Dave Butts, Frank Frederick, Vern Cunningham and possibly Ed Springer.
>
> Q. All right. Now, anybody from Littman . . .

Brothers? A. And the two Littmans, Benson and Danny.

Q. Okay. And what discussions took place at that meeting? A. We discussed in general — Mr. Butts made a presentation as to the fan line and Mr. — I guess it was the older one, Benson Littman, pretty much led the discussion for their part.

Q. What did he have to say? A. Implied what they could do for us in the Chicago market and in the Milwaukee market and —

Q. Exactly what did they say as best you can recall? A. Well, that through their marketing, the fact that they had so many stores and that they did a lot of advertising that they would be able — they would be able to cover the market for us and give us distribution throughout the entire marketing area and that they were ready to write an order, they had brought orders with them and that they were ready to write an order, to give us an order right now and were willing to negotiate.

Q. All right. What do you mean by — your understanding of the phrase 'were willing to negotiate'? A. We discussed — I don't remember the details of what was actually discussed. We discussed advertising, as to what they would do for us, and what percentage they would get; shipments to their single warehouse instead of to the thirteen warehouses. They also discussed how many sample fans they would get, and they negotiated that with Mr. Butts as to the

fans per store. We discussed how many catalogs they would need. And then Mr. Littman asked us regarding the distribution, and one of the key things he said, 'This is conditioned on that you do not sell A-Abart'.

Q. He made that statement? A. Yes.

Q. All right. And that statement was made in the presence of the various parties that you have listed?

* * *

Q. All right. And when Benson Littman made that statement what response if any was made by Mr. Butts? A. I couldn't tell you the exact words. It was basically an agreement that, yes, we can do that.

Q. Yes, we can do that? A. I don't know the exact words.

Q. But it was an affirmative response? A. I don't know if there was 'agreement', but an affirmative response to that.

Q. And when that affirmative response was given by Mr. Butts was there any further conversation with Littman regarding this? A. Well, I had mentioned the negotiation regarding quantities of fans. That all occurred in that meeting. I can't give you the exact sequence of events. So that's some of the negotiations, for quantities of fans, for samples and things, might have occurred after that statement was made. That was kind of a key statement, it may have been

made early in the conversation, and then the rest of the negotiations proceeded from there because I believe it was a condition that if we — if we agreed to that, then we could go on to the rest, and since it was agreed or an affirmative answer to his condition —

Q. Let me ask you this; in your role as national sales manager and setting up systems of distribution for the Emerson fans in various parts of the country had you encountered a similar type of situation among others in your other territories?

* * *

A. There was only one other city in which we had a — told someone we could not sell them, and that was in Kansas City where we had two distributors, one who said, 'I won't buy if you sell to him'. And he said, 'I won't buy if you sell to him'. And it was a decision made on our — on my part and the rep from that area to say, 'We'll sell to A instead of to B'. That was the only other place we had that situation. A lot of people throughout the United States try to condition you with 'I won't sell to him and I won't sell to him', but you try to address that.

Q. (by Mr. Kaplan) In fact, you try to avoid it? A. Right.

Q. All right. Let me refer you to Plaintiff's Exhibit No. 6 where it says — the letter of Butts dated December 5th — 'Littman will be our primary Chicago/Milwaukee dealer. The number of dealers will be restricted to allow everyone to maintain margins'. What did that language mean

to you? [125a]

* * *

A. It's difficult for me to think what was in Mr. Butt's mind, but he was basically assuring Mr. Littman —.

Also evidencing the fact that Littman advised Emerson that Littman would not buy the Emerson line of ceiling fans if Emerson sold to A-Abart is the sworn response of Benson Littman to Petitioner's Interrogatories No. 8 and 9, to wit as follows (set forth at pp. 62-63 of Appendix filed in the Court of Appeals):

Interrogatory No. 8:

Did Littman, in connection with its agreement to become a dealer or distributor of Emerson's electric ceiling fans, or as a condition of buying such fans from Emerson, ever request Emerson not to sell Emerson's electric ceiling fans to A-Abart?

Response to Interrogatory No. 8:

Littman advised Emerson that it was interested in Emerson's line of ceiling fans, but they would not buy the line if Emerson sold it to A-Abart.

Interrogatory No. 9:

Has Emerson ever agreed with or promised Littman not to sell Emerson electric ceiling fans to A-Abart and, if so, when?

Response to Interrogatory No. 9:

> By letter dated December 5, 1988, David L. Butts of Emerson advised Littman that Emerson had decided to limit the scope of marketing of its electric fans in the Chicago metropolitan area.

It is to be noted that Mr. Weber (who as the national sales manager of Emerson had set up the distribution system and sales representatives of Emerson throughout the United States in connection with Emerson's new ceiling fan line) favored a broad based system of distribution in the Chicago market area, and concurred with the objections voiced by Mr. Ippolito (the Chicago area sales representative of the Emerson ceiling fan line), to the so-called "limited marketing strategy" advocated and adopted by Messrs. Sly and Butts on behalf of Emerson under which Emerson, as a condition of Littman buying from Emerson, agreed with Littman that Emerson would not sell its ceiling fan line to A-Abart. Mr. Ippplito's objections are set forth in his handwritten memorandum of November 20, 1988 (Appendix M-2, 124a), addressed to Messrs. Butts and Weber, and reflect, among other things, the fact that Mr. Ippolito had already acquired, as of that date, written or verbal commitments for some 10,000 Emerson fans from 14 potential dealer accounts in the Chicagoland area (including 2,000 units from A-Abart), with an additional potential of 3,000 fan units from 10 to 15 other accounts.

Note Mr. Weber's explanatory testimony, at pages 47-49 of his evidence deposition (Appendix M-1, 114a) relative to Emerson's approach to marketing the Emerson fan line, to wit:

> Q. (by Mr. Kaplan) All right. I take it from your testimony that Mr. Sly and Mr. Butts disagreed with your approach to the marketing of the EMERSON fan line, is that correct? A. Mr.

> Sly and Mr. Butts and I had a disagreement in the Chicago market because of this condition with Littman and our going with the other approach. I set up the distribution, the representatives, in every other part of the country and had no objections in any way, shape or form from Mr. Butts or Mr. Sly. I had that authority. *In Chicago my approach was I did not want to put my eggs all in one basket and I felt it would be better to go on a broader base distribution. As I said, we disagreed. We had done this in all the other cities; we had not had the situation to arise where one dealer was so strong to penetrate the whole market as in the case of Littman. So we did not have that condition proposed to us anyplace else.* In this case, I had been in the business a long time, in the specific distribution/rep agency/marketing end of it; Mr. Butts and Mr. Sly were somewhat new to that. My idea, I would feel it would be better to do it this way. That was my opinion. They disagreed. They felt it would be better to go with one dealer, one shipment, one payment, one guy that does all the advertising and everything else. It was a decision between two people, two groups, them and us, them and me.

(Emphasis ours.)

Emerson has taken the position that it will not sell its ceiling fan line to A-Abart. Notwithstanding which, Emerson, in addition to selling its ceiling fan line to Littman, has also been selling same to at least five (5) other competing local ceiling fan dealers in the Chicago area (to wit: Crest Lighting Studio of Crestwood, Helsel Jepperson of Chicago, Grand Lighting Gallery of Waukegan, Lighthouse Lighting of Villa Park, and Raydon Lamp

& Lighting Gallery of Schaumburg (pp. 107-108 of Appendix filed in the Court of Appeals).

That Petitioner has been injured economically in its trade and business as a result of the aforesaid conduct and agreement between Emerson and Littman (a separate "damages" issue reserved by Petitioner's Motions For Partial Summary Judgment as it relates to the issue of liability), is reflected in Petitioner's verified further Supplemental Response (dated April 16, 1990) to Respondents' Written Interrogatories (contained in Pleadings Volume I of the Transcript of the Record On Appeal, as part of Item No. 81, filed in the Circuit Court of Appeals), which indicates that for the calendar year 1989 Petitioner's sales totaled $1,862,208.94 for the four stores that were in existence in 1988 (but excluding the Lisle store that was not opened until 1989), a decline of $288,694.06 from its sales of $2,150,904 for the calendar year 1988. This excludes any losses in sales and profits sustained by Petitioner for calendar years subsequent to 1989.

REASONS FOR GRANTING THE WRIT

I.

Why Petitioners' Petition for Writ of Certiorari Should Be Granted

As outlined below, this case presents important issues of antitrust law, as well as related issues of the law of unfair competition, as it relates (1) to the propriety of the applicability to this cause by the courts below of this Court's decision in *Business Electronics v. Sharp Electronics,* 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988), and (2) the proper criteria for determining when a restraint may constitute an unreasonable restraint of trade in "per se" violation of § 1 of the Sherman Act.

This case is also important and deserves review by this Court

because it raises serious constitutional questions, as well as ethical questions for members of the Bar, concerning the unwarranted and punitive imposition of Rule 11 and Rule 38 sanctions by the courts below, and the need for this Court to provide proper standards and guidelines to the courts below for the imposition of such sanctions in order to prevent judicial abuse and the chilling of legitimate doctrine challenging advocacy, as has occurred in the instant cause.

II.

Because of the differences in factual circumstances in the instant cause from those existing in *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988), this Court's decision in that case is not and should not be dispositive of Petitioner's antitrust action herein.

In *Business Electronics* this Court held that an agreement between a manufacturer and one of its existing dealers to terminate another existing dealer because of the latter dealer's price cutting and "free riding" practices, should, in the absence of a price fixing agreement between the manufacturer and the first dealer, be governed by the "rule of reason," rather than under the "per se" doctrine of illegality, since in a given case under such circumstances there could be a valid business or economic justification for the manufacturer terminating the dealership and refusing to sell to the offending dealer.

As is readily apparent from the record herein, those are not the factual circumstance present in the instant cause. The problem that arises, however, is the "dictum" contained in the very last paragraph of the majority opinion in *Business Electronics* where the Court concluded "that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels." Because of that "dictum", the courts below in the instant cause,

without any attempt to analyze the factual differences in the instant cause from those present in *Business Electronics,* and without any attempt to deal with or even discuss the anticompetitive nature of the restraint in the instant cause, and the lack of any redeeming feature to justify its existence, simply concluded that the restraint in the instant cause was a vertical one and that therefore could not be per se illegal under the Sherman Act.

While the conclusion of this Court, as expresssed in the majority opinion in *Business Electronics,* that the offending trade or business practices engaged in by the offending dealer in that case did not warrant the application of the per se doctrine of illegality, certainly makes sense under the factual cirumstances of that case; the construction by the courts below of that dictum is at the very least questionable, as herein pointed out, and would leave an innocent party, the Petitioner herein, without a remedy for what is clearly an unjustified anticompetitive practice which the Sherman Act is intended to protect it from.

The instant A-Abart cause involves an unadulterated, unjustified "conspiracy" (clearly established by the uncontroverted evidence) between Littman and Emerson to shut A-Abart out of an important and vital segment of the supplier market (for which there was no substitute because of the price differential between the Emerson line and the Casablanca line of ceiling fans). Unlike *Business Electronics,* where the terminated dealer's conduct or business practices could conceivably justify the manufacturer's decision to terminate his dealership, there was no questionable or objectionable business conduct whatsoever upon the part of A-Abart to justify Emerson refusing to sell to A-Abart. Nor can the restraint in the instant cause be justified on any valid business or economic ground, given the fact that Emerson was selling to other dealers, as well as Littman, in the Chicagoland area, and the fact that Emerson had sought out and solicited A-Abart to become one of its dealers and had taken an initial order (solicited

by Emerson's Chicago area sales representative) for 552 ceiling fans and related accessories after agreeing to take on A-Abart as one of its dealers, and the further undisputed fact that the undisputed agreement between Emerson and Littman, wherein Emerson agreed not to sell to A-Abart was strongly opposed both by the national sales manager (Mr. Weber) and the Chicago area sales representative (Mr. Ippolito) of Emerson.

This against a backdrop of the fact that Littman's 11 retail store outlets in the Chicago area bracketed and penetrated the entire Chicago area market (a fact recognized by Mr. Weber), and the fact that A-Abart (with its 5 stores) was the principal competitor of Littman.

The facts in instant A-Abart case do not fall within the pattern of business or economic practices presented by *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977) or *Business Electronic,* where there might conceivably be a valid and justifiable business or economic justification for a manufacturer to refuse to deal or to terminate an existing dealer, and therefore provide the rationale for application of the rule of reason. Rather what is involved in the A-Abart case is plain and simply a "naked restraint" (a product of a proven agreement and conspiracy between Emerson and Littman), with no redeeming feature to justify its existence; and whose only purpose and operative effect is to foreclose, without justification, the Petitioner from an important and vital segment of the supplier market (for which there is no substitute given the fact that the Emerson ceiling fan line was priced substantially below the Casablanca ceiling fan line).

Perhaps the best exposition of the doctrine of "per se" illegality, and its applicability to antitrust law, is that set forth by the United States Supreme Court in *Northern Pacific Railroad Co. v. United States,* 365 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L.

Ed. 2d 545 (1958), where Justice Black, speaking for the Court, said:

> . . . There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of "per se" unreasonableness . . . makes the type of restraints which are prescribed by the Sherman Act more certain to the benefit of everyone concerned . . . .

The common thread or denominator to be found in all "per ser" restraints is that they are inherently anticompetitive in nature and without any legitimate redeeming features to justify their existence.

The label or "line drawing" attached to a particular restraint, *i.e.*, whether it is deemed a "vertical restraint, or a "horizontal restraint", or a "hybrid" form of restraint (*i.e.*, one facially vertical but operative horizontally) is important only insofar as the nature and form of the particular restraint involves conduct inherently anticompetitive having no legitimate redeeming feature to justify its existence. Thus, for example, a "tying arrangement", though clearly a vertical restraint, is generally, with few exceptions, is held to be a "per se" violation. That is the proper test for a "per se" restraint, not the label or "line drawing" attached to a particular restraint, as in the instant A-Abart case.

In *Business Electronics* this Court (at 485 U.S. at 724, 108 S. Ct. at 1519) stated that departure from the rule of reason standard in the contest of a vertical restraint "*must be based on demonstrable economic effect rather than . . . upon formalistic*

line drawing," (emphasis ours), and that to justify application of the per se doctrine of illegality that the restraint has to be shown as "having a pernicious effect on competition" and be so lacking in redeeming value as to justify the application of the per se doctrine of illegality.

See Northern Pacific R. Co. v. United States, 365 U.S. 1, 5, 78 S. Ct. 514, 518 (1958); *National Soc. of Professional Engineers v. United States,* 435 U.S. 679, 692, 98 S. Ct. 1355, 1365 (1978).

Petitioner respectfully submits that the A-Abart case is such a given case, and that under the undisputed factual context disclosed by the record, that the "naked" restraint in this cause has a "demonstrable economic" and "pernicious" effect on competition, and is so lacking in any bona fide redeeming qualities as to justify application of the "per se" doctrine.

See also, Northwest Stationers v. Pacific Stationery, 472 U.S. 284, 290 (1984), where the Supreme Court, citing additional authority, said:

> This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of § 1 of the Sherman Act. See *Klor's, Inc. v. Bradway-Hale Stores, Inc.,* 359 U.S. 207 (1959); *United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Radiant Burners, Inv. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961); *Associated Press v. United States,* 326 U.S. 1 (1945); *Fashion Originators' Guild of America, Inc. v. FTC,* 312 U.S. 457 (1941); *Eastern States Retail Lumber*

Dealers' Assn. v. United States, 234 U.S. 600 (1914).

The restraint here imposed does not "regulate" competition, but "suppresses and destroys competition'. *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447, at 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986).

See also, Klors Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 710 (1959), where the Court held that a conspiracy between various manufacturers and a retailer competitor of the plaintiff, wherein the manufacturers agreed not to sell their products to plaintiff in that case (or to sell only at discriminatory prices) deprived the plaintiff (Klors, Inc.) of its freedom to buy appliances in an open competitive market and interferes with the natural flow of interstate commerce.

Whatever reasons Emerson may have had for wanting to sell to Littman, its decision not to sell to A-Abart was not an independent or unilateral one but one indissolubly *linked* to Littman's requirement that Emerson not sell to A-Abart as a "condition" of Littman buying from Emerson, and Emerson's agreement and acquiescence thereto. That "link" is what condemns the agreement herein between Emerson and Littman as an unlawful conspiracy and an unlawful concerted refusal to deal (or boycott) in violation of § 1 of the Sherman Act. As such it has no redeeming features, since its only purpose and operative effect is and has been to foreclose the petitioner from an important and vital segment of the supplier market for which (because the Emerson ceiling fan line was priced substantially below the comparative Casablanca ceiling fan line) there has been no substitute, and thus restrict and impair the competitive processes.

It is respectfully submitted that the courts below in construing this Court's decision in ***Business Electronics***, as they have in this

cause, as standing for the proposition that a vertical restraint, absent price fixing or an agreement on price, cannot, under any circumstances and regardless of the nature of the vertical restraint involved, ever constitute a "per se" violation of the Sherman Act, is to impose an unwarranted, undesirable and artificial shackle on the legitimate growth and development of federal antitrust law.

III.

The Question of Rule 11 and Rule 38 Sanctions

The imposition of Rule 11 sanctions by the District Court against Petitioner and its counsel, and the imposition of Rule 38 sanctions by the Court of Appeals against Petitioner and its counsel, were both predicated on the ground that Petitioner's lawsuit and appeal were allegedly "frivolous" in that this Court's decision in *Business Electronics*, was dispositive, as a matter of law, of Petitioner's antitrust claim, and therefore operated as a bar to Petitioner's lawsuit.

As this Court is undoubtedly aware, the application of Rule 11 sanctions has been subject to much criticism. Commentators have argued that, in its application, it chills doctrine-challenging advocacy; undermines its own purpose of streamlining federal court litigation by generating satellite litigation; conflicts with the federal rules of "liberal pleading policies"; is imposed disproportionately in certain types of litigation; lacks judicial standards and guidelines and is therefore applied inconsistently; and fosters lack of collegiality between respective counsel by putting "a premium on first trying the case, and then trying the lawyer". (*See* the Law Review and Bar Journal articles cited in the Table of Authorities.)

Rule 38 sanctions are subject to much the same criticism insofar as, in its application (as in the instant cause), it unfairly

pins the label of "frivolous" on legitimate advocacy.

Paragraph 7 of the Advisory Committee Notes to the 1983 Amendment of Rule 11 states, among other things: "*The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories*" (emphasis ours). That admonition, unfortunately, has fallen on deaf ears in the instant cause.

In the instant cause, Petitioner and its counsel proved the facts of its case, and the factual allegations of its Complaint. The only question was whether this Court's decision in *Business Electronics,* operated as a bar to Petitioner's antitrust action. From the inception of the case, Petitioner and its counsel took the position that because of the factual differences and circumstances in the instant cause, from the facts present in *Business Electronics,* that the latter case, for reasons spelled out in Petitioner's pleadings,was not necessarily a bar to Petitioner's within cause of action, At no time did Petitioner or its counsel ever misrepresent the facts or import of that case. *See* Appendices H, I and J as to the imposition of Rule 11 sanctions by the District Court, and Appendix B, C and E as to the imposition of Rule 38 sanctions by the Court of Appeals.

It is respectfully submitted that the imposition of sanctions in the instant cause by the courts below is totally unfair and unwarranted, and constitutes a denial of substantive due process in violation of the Fifth Amendment of the Federal Constitution, and a denial of counsel's First Amendment rights of freedom of speech and duty of advocacy in violation of the First Amendment to the Federal Constitution.

CONCLUSION

For the reasons hereinbefore set forth, Petitioners respectfully pray that the Writ of Certiorari to review the opinion and orders of the United of the States Court of Appeals for the Seventh Ciruit in Case Numbers 90-3751 and 91-2221, consolidated, decided on February 27, 1992, on which Petition for Rehearing was denied on April 23, 1992, should be issued.

Respectfully submitted,

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APPENDIX A — JUDGMENT ORDER OF UNITED STATES COURT OF APPEALS DATED FEBRUARY 27, 1992

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: February 27, 1992

BEFORE: Honorable Harlington Wood, Jr., Circuit Judge*
Honorable John L. Coffey, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

Nos. 90-3751 and 91-2221

A-ABART ELECTRIC SUPPLY, INCORPORATED, an Illinois corporation,

Plaintiff-Appellant

v.

EMERSON ELECTRIC COMPANY, (BUILDER PRODUCTS DIVISION), a Missouri corporation, and LITTMAN BROTHERS ENERGY SUPPLIES, INCORPORATED, an Illinois Corporation,

Defendants-Appellees

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 C 10759, Judge Harry D. Leinenweber

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* Judge Harlington Wood, Jr. assumed senior status on January 16, 1992, which was after oral argument in this case.

Appendix A

This cause was heard on the record from the above mentioned district court, and was argued by counsel.**

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, and the costs of this appeal, including attorneys' fees, are assessed against A-Abart's attorney, in accordance with the decision of this Court entered this date.

** Appeal No. 91-2221 was submitted for decision without oral argument.

APPENDIX B — OPINION OF UNITED STATES COURT OF APPEALS DATED FEBRUARY 27, 1992

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 90-3751 and 91-2221

A-ABART ELECTRIC SUPPLY, INCORPORATED,

Plaintiff-Appellant,

v.

EMERSON ELECTRIC COMPANY and LITTMAN BROTHERS ENERGY SUPPLIES, INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 10759—**Harry D. Leinenweber,** *Judge.*

ARGUED MAY 8, 1991—DECIDED FEBRUARY 27, 1992

Before WOOD, JR., COFFEY and KANNE, *Circuit Judges.*

COFFEY, *Circuit Judge.* A-Abart Electric Supply, Inc. ("A-Abart") filed a three-count complaint in the district court against Emerson Electric Company ("Emerson") and Littman Brothers Energy Supplies, Inc. ("Littman"). Count I alleged that both Emerson and Littman violated Section I of the Sherman Act, 15 U.S.C. § 1. Count II charged Emerson with breaching a contract to sell A-Abart 552 ceiling fans and related accessories. Count III charged Littman with tortious interference with A-Abart's contractual relations with Emerson and with A-Abart's prospective economic relationship with Emerson. All three parties

moved for summary judgment. The district court entered summary judgment against A-Abart on all three counts. A-Abart appeals the summary judgment order. In a separate appeal arising from the same litigation, A-Abart contests the district court's imposition of a $2,500 fine on A-Abart's counsel pursuant to Fed.R.Civ.P. 11. We consolidated these two appeals and now affirm.

FACTUAL BACKGROUND

In 1988, Emerson, a Missouri corporation and manufacturer of electrical products, began to market a new line of ceiling fans across the country, including the Chicago, Illinois area. A-Abart and Littman were both in the retail ceiling fan business in the Chicago area.

On September 8, 1988, representatives of Emerson met with representatives of Littman to present Littman with a proposed marketing strategy for the new line of Emerson ceiling fans. During this meeting, the Littman representatives asked the Emerson representatives the names of other local distributors who would be carrying the new line. Emerson stated that it intended to call on every retail seller in Chicago and a decision would then be made to whom they would make their fans available for sale. Littman representatives advised their Emerson counterparts that if Emerson intended to make their line of ceiling fans available to Littman's primary competitor, A-Abart, Littman was not interested in carrying the new ceiling fan line. Littman stated that it made this business judgment concerning the broader market area because it did not want to commit its advertising and marketing resources to introduce and promote this new product if the market share would be insufficient to justify the expense.

On October 18, 1988, Emerson met with A-Abart in Chicago to present its marketing plan for the new ceiling fan. Price lists, brochures and purchase order forms were supplied to A-Abart. On November 18, 1988, A-Abart submitted to Emerson a purchase order for 552 ceiling fans on a form provided by Emerson. According to A-Abart's

president, the order had been solicited by an Emerson Chicago area sales representative who gave A-Abart a verbal assurance that it would be accepted.

After the September 8th, 1988 meeting, there were no further discussions between Emerson and Littman until November 30, 1988, when Emerson informed Littman that it had decided to sell to Littman and not to A-Abart. A-Abart does not contend, and there is no record evidence demonstrating that Emerson and Littman agreed with any other retailer to exclude A-Abart from the selling of the new ceiling fan line.

The district court, after finding no material facts in dispute, entered summary judgment against A-Abart on all three counts. The court also sanctioned A-Abart's counsel pursuant to Fed.R.Civ.P. 11. We affirm.

I.

A summary judgment motion should be granted by the district court "only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In reviewing a grant of summary judgment, we must view the record and all inferences drawn therefrom in the light most favorable to the party opposing the motion." *Beard v. Whitley County REMC*, 840 F.2d 405, 409-10 (7th Cir. 1988) (citations omitted).

II.

In Count I of its complaint, and again on appeal, A-Abart alleges that Emerson's refusal, at Littman's insistence, to sell its new ceiling fan line to A-Abart constituted a *per se* violation of Section I of the Sherman Act. The Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

In *Business Electronics Corp. v. Sharp Electronics Corporation*, 485 U.S. 717, 108 S. Ct. 1515 (1988) the Supreme

Court considered this same argument on a factual record strikingly similar to the one presented in this appeal. In *Business Electronics*, an electronic calculator retailer, Hartwell, informed its supplier, Sharp Electronics, that it would terminate its dealership unless the supplier ended its relationship with a rival retailer, Business Electronics. Sharp then terminated Business Electronics' dealership. Business Electronics brought suit alleging that Sharp and Hartwell had conspired to terminate Business Electronics' dealership and that such a conspiracy was illegal *per se* under § 1 of the Sherman Act.

The Supreme Court began its analysis in *Business Electronics* by noting that

> "[o]rdinarily, whether particular concerted conduct violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason—that is, 'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.' *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). . . . We have said that *per se* rules are appropriate only for 'conduct that is manifestly anticompetitive,' *id.*, at 50, that is, conduct 'that would always or almost always tend to restrict competition and decrease output,' "

Business Electronics, 485 U.S. at 723, 108 S. Ct. at 1519 (citations omitted).

The Court further noted that

> "[a]lthough vertical agreements on resale prices have been illegal *per se* since" 1911 "we have recognized that the scope of *per se* illegality should be narrow in the context of vertical restraints. In *Continental T. V., Inc. v. GTE Sylvania Inc.*, . . . *we refused to extend* per se *illegality to vertical nonprice restraints*, specifically to a manufacturer's termination of one dealer pursuant to an exclusive territory agreement with another. . . . We concluded that vertical nonprice restraints had not been shown to have such a 'per-

> nicious effect on competition' and to be so 'lack[ing] [in] . . . redeeming value' as to justify *per se* illegality. . . . Rather, we found, they had real potential to stimulate interbrand competition, 'the primary concern of antitrust law.' "

Business Electronics, 485 U.S. at 724, 108 S. Ct. at 1519 (emphasis added) (citations omitted).

Thus, as the district court stated, "the only two relevant questions are whether the restraint imposed by the alleged 'conspiracy' between Emerson and Littman is 'vertical' or 'horizontal' and, if vertical, whether the restraint involves prices or price levels." A-Abart argues that the alleged agreement between Emerson and Littman "though facially vertical" should be considered a horizontal restraint of trade. Appellant's brief at 27. *Business Electronics* makes clear that the kind of restraint alleged by A-Abart is vertical. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Electronics*, 485 U.S. at 730, 108 S. Ct. at 1523. "[A] restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." *Business Electronics*, 485 U.S. at 731 n.4, 108 S. Ct. at 1523. Here, the alleged conspiracy was a vertical one because it was between two firms at different levels in the distribution spectrum: Emerson, a manufacturer, and Littman, a retailer. The alleged conspiracy was the product of a vertical agreement.

Business Electronics thus requires that A-Abart demonstrate that an agreement on price levels was part of the alleged Emerson-Littman conspiracy. A-Abart, however, does not argue that the agreement involved price or price levels. A vertical restraint of trade that does not involve price levels is not *per se* illegal under the Supreme Court's interpretation of § 1 of the Sherman Act.

A-Abart's only chance for a successful claim on these facts under § 1 of the Sherman Act is to demonstrate that under a "rule of reason [test] . . . all of the circumstances

of a case . . . [demonstrate that] a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Business Electronics*, 485 U.S. at 723, 108 S. Ct. at 1519. "Under that analysis the plaintiff must show that the challenged restraint has an adverse impact on competition in the relevant market." *Bi-Rite Oil Company, Inc. v. Indiana Farm Bureau Cooperative Association, Inc.*, 908 F.2d 200, 203 (7th Cir. 1990). A-Abart, in its brief, makes a one sentence mention of the rule-of-reason test, but only to assert that there is no "legal economic justification" for Emerson's decision. A-Abart does not attempt to make the required showing of an adverse competitive effect on the relevant market and therefore does not make out a claim under the rule-of-reason test. Thus, the district court's summary judgment as to A-Abart's Sherman Act claim was appropriate.

III.

Count II of A-Abart's complaint is a breach of contract claim founded on Emerson's failure to supply A-Abart with 552 ceiling fans in response to a purchase order from A-Abart. A-Abart concedes that this purchase order form is the only written evidence of what it alleges was a verbal agreement between it and Emerson to sell the 552 fans. The Illinois Statute of Frauds stands as a bar to viewing this alleged agreement as an enforceable contract. The Illinois provision provides that "a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . ." Ill.Rev.Stat., ch.26, §2-201(1). *See, e.g., Lee v. Voyles*, 898 F.2d 76, 78 (7th Cir. 1990). A-Abart does not dispute that the alleged agreement involving the 552 ceiling fans falls within the terms of the Illinois statute of frauds. A-Abart also concedes that Emerson, the party against whom it seeks to enforce the agreement to sell the 552 fans, did not sign the purchase order, the only written evidence of the agreement. Thus, it would appear that the statute of frauds

stands as an absolute bar to A-Abart's breach of contract claim.

A-Abart seeks to evade the preclusive effect of the statute of frauds by arguing that, under Illinois law, the doctrine of promissory estoppel prevents Emerson from asserting the statute of frauds defense. In this argument, A-Abart relies on *R.S. Bennett & Co. v. Economy Mechanical Industries, Inc.*, 606 F.2d 182, 187 (7th Cir. 1979), in which we predicted, "not without some difficulty, [that] the Illinois Supreme Court would permit the plaintiff to seek recovery on a promissory estoppel theory" even though the defendant "successfully defends on the basis of the statute of frauds." We have since become less sure of the prediction made in *R.S. Bennett*, observing that "there is arguably some question with respect to whether the Illinois Supreme Court would allow a party to raise the statute of frauds as a defense in an action premised upon promissory estoppel, especially in cases arising under the U.C.C." *Evans v. Fluor Distribution Companies*, 799 F.2d 364, 368 (7th Cir. 1986). *See, also, Monetti, S.P.A. v. Anchor Hocking Corporation*, 931 F.2d 1178, 1186 (7th Cir. 1991) (summarizing arguments for and against the position taken in *R.S. Bennett* and noting that the question had not been resolved by the Illinois courts) and *Goldstick v. ICM Realty*, 788 F.2d 456, 464 (7th Cir. 1986) ("We hesitate to rely on *Bennett* because there is a question whether it is a correct statement of Illinois law.").

We need not enter this thicket to decide whether in Illinois the doctrine of promissory estoppel can save a claim otherwise barred by the statute of frauds because A-Abart has failed to make the required showing to sustain a claim of promissory estoppel. In Illinois, the "elements of promissory estoppel are: a promise unambiguous in terms, with reliance thereon by the promisee, with such reliance being expected and foreseeable by the promisor, and with the promisee in fact relying on the promise to his injury. . . . [I]n order to invoke the doctrine, the promisee's reliance must be reasonable and justifiable." *Geva v. Leo Burnett*

Company, 931 F.2d 1220, 1223 (7th Cir. 1991) (quoting *Vincent Di Vito, Inc. v. Vollmar Clay Products Co.*, 534 N.E.2d 575, 577 (Ill.App. 3d Dist. 1989)). A-Abart has not produced any evidence or made an argument demonstrating that it relied to its detriment on the alleged promise by Emerson to sell it the ceiling fans. Thus, the promissory estoppel argument fails.

IV.

Count III of the appellant's complaint charged Littman (1) with intentionally interfering with contractual relations between A-Abart and Emerson and (2) with intentionally interfering with A-Abart's prospective economic advantage in its dealings with Emerson.

Under Illinois law, "[t]he elements of the tort of intentional interference with contractual rights include (1) the existence of a valid and enforceable contract between the plaintiff and another, (2) the defendant's awareness of this contractual relation, (3) the defendant's intentional and unjustified inducement of a breach of the contract which causes a subsequent breach by the other, and (4) damages." *Mannion v. Stallings & Co.*, 561 N.E.2d 1134, 1139 (Ill.App. 1 Dist. 1990). *See also Olaf v. Christe Clinic Association and HMO*, 558 N.E.2d 610, 613 (Ill.App. 4th Dist.) *app. denied*, 135 Ill.2d 559, 564 N.E.2d 840 (1990); *Prudential Insurance Co. v. Van Matre*, 511 N.E.2d 740, 744 (Ill.App. 3d Dist.), *app. denied*, 117 Ill.2d 553, 517 N.E.2d 1095 (1987). A-Abart, as we have related above, did not have an enforceable contract with Emerson to buy the 552 ceiling fans. The inability to establish the existence of a valid and enforceable contract is obviously fatal to a claim of intentional interference with contractual relations.

That leaves A-Abart's intentional-interference-with-prospective-economic-advantage claim. The elements of this tort are: "(1) plaintiff must have a reasonable expectation of entering a valid business relationship; (2) defendant must purposely interfere and defeat this legitimate expectancy; and (3) defendant's actions must cause harm

to plaintiff." *Kurtz v. Illinois National Bank*, 534 N.E.2d 1007, 1012 (Ill.App. 4th Dist.), *app. denied*, 126 Ill.2d 559, 541 N.E.2d 1107 (1989) (citations omitted). Under Illinois law, a party's interest in prospective economic advantage, however, receives less protection than its enforceable contract rights:

> "An individual with a prospective business relationship has a mere expectancy of future economic gain; a party to a contract has a certain and enforceable expectation of receiving the benefits of the contract. When a business relationship affords the parties no enforceable expectations, but only the hope of . . . benefits, the parties must allow for the rights of others. They therefore have no cause of action against a bona fide competitor unless the circumstances indicate unfair competition, that is, an unprivileged interference with prospective advantage."

Fishman v. Estate of Wirtz, 807 F.2d 520, 546 (7th Cir. 1987) (quoting *Belden Corp. v. InterNorth, Inc.*, 90 Ill. App.3d 547, 552, 45 Ill.Dec. 765, 769, 413 N.E.2d 98, 102 (1st Dist. 1980)). Illinois courts have adopted the formulation of the Restatement (Second) of Torts, § 768 (1979) in defining unlawful competition. *Fishman*, 807 F.2d at 547 (citing *Galinski v. Kessler*, 134 Ill.App.3d 602, 610, 89 Ill.Dec. 433, 439, 480 N.E.2d 1176, 1182 (1st Dist. 1985)). Under that formulation,

> "(1) [o]ne who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor . . . does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue in an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other."

Id. See also Candalaus Chicago, Inc. v. Evans Mill Supply Company, 366 N.E.2d 319 (Ill.App. 1st Dist. 1977)

(basing the same doctrine on Restatement of Torts § 768 (1939)). "This 'competitors privilege' arises when the business relation concerns a matter involving competition between the actor and the competitor." *Mannion*, 561 N.E. 2d at 1141.

A-Abart's allegations that Littman intentionally interfered with its business expectancy with Emerson, even if true, fall within this competitor's privilege exception to the tort of intentional interference with prospective economic advantage. Littman was acting to advance its interests at the expense of its competitor A-Abart by securing the Emerson contract and denying it to A-Abart. Littman's actions, as we have held above, did not contribute to an unlawful restraint of trade. Thus, Littman is protected by the competitor's privilege from liability for A-Abart's claim of intentional interference with prospective economic advantage.

V.

We turn finally to the question of sanctions. A-Abart challenges the imposition by the district court of a $2,500 fine on A-Abart's counsel pursuant to Fed.R.Civ.P. 11 to be paid to the Clerk of the United States District Court. The district court imposed the fine after finding that A-Abart's anti-trust claim was sanctionable. Rule 11 provides that an attorney's or party's signature on each paper filed in district court,

> "Constitutes a certificate by the signor that the signor has read the pleading, motion, or other paper; that to the best of the signor's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

"The district court employs an objectively reasonable standard in assessing whether an attorney's conduct violates the rule." *Thompson v. Duke*, 940 F.2d 192, 195 (7th Cir. 1991). We have interpreted Rule 11 as creating four requirements:

> "There must be 'reasonable inquiry' into both fact and law; there must be good faith (that is, the paper may not be interposed 'to harass'); the legal theory must be objectively 'warranted by existing law or a good faith argument' for the modification of existing law; and the lawyer must believe that the complaint is 'well grounded in fact'. The attorney filing the complaint or other paper must satisfy all four requirements."

Thompson, 940 F.2d at 195 (quoting *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987)).

We review district courts' decisions as to the appropriateness of imposing Rule 11 sanctions under a deferential "abuse of discretion" standard. *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 933 (7th Cir. 1989) (en banc). We adopted this deferential standard of review "because the trial court alone has an intimate familiarity with the relevant proceedings . . . ." *Id.* at 933 (citation omitted).

The district court's decision to impose Rule 11 sanctions on A-Abart's counsel was not an abuse of its discretion. Throughout the litigation in the district court, A-Abart argued that the defendants' alleged actions amounted to a *per se* violation of the Sherman Act. This argument, as the district court noted in dismissing it, "flies in the face" of the unambiguous doctrine set out in *Business Electronics*. The district court, during the hearing in which it ruled on the motion for Rule 11 sanctions, observed that "[a]t no time did plaintiff allege that Emerson and Littman reached an agreement as to price or price levels. Therefore, it can readily be seen that the alleged agreement should be characterized as a vertical non-price agreement." As we noted above, once this determination has

been made, the agreement cannot be considered a *per se* violation of § 1 of the Sherman Act under the *Business Electronics* doctrine.

A-Abart argued in the district court that the facts of *Business Electronics* are distinguishable from those in the instant case. But we agree with the district court that at no time did "[p]laintiff . . . . explain why one restraint is vertical, that is the one in [*Business Electronics*], while the [instant] one is horizontal . . . . At no time did plaintiff claim that other dealers joined with Littman, thus creating a horizontal agreement." In fact, the district court viewed A-Abart's anti-trust claim as so frivolous that it warned the defendants that "plaintiff's arguments were so clearly contrary to Supreme Court authority, it would not expect to see excessively bloated fee statements in connection with plaintiff's anti-trust claim . . . ."

The district court cited other reasons for imposing Rule 11 sanctions on A-Abart's counsel. In A-Abart's reply memorandum of law in support of its amended motion for partial summary judgment, A-Abart's counsel, as the district court noted, "quoted cases and language from the dissent" in *Business Electronics* as if from the majority opinion. Moreover, in its memorandum, A-Abart's counsel quoted from *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3rd Cir. 1979), without informing the district court that the Supreme Court's *Business Electronics* decision had rejected the reasoning excerpted from the *Cernuto* decision. Thus, we are persuaded that the district court did not abuse its discretion in imposing Rule 11 sanctions on A-Abart's counsel for filing a frivolous anti-trust claim.

We now turn to the argument made by both Emerson and Littman that this appeal is frivolous and that A-Abart should be sanctioned pursuant to Federal Rule of Appellate Procedure 38. Under that rule, "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Appendix B

Rule 38 plays a vital role in our appellate system. " 'The purpose of [Rule 38] is twofold. First, it operates to compensate winners of judgments in the district court for the expense and delay of defending against meritless arguments in the court of appeals. Second, it seeks to deter such appeals and thus to preserve the appellate court calendar for cases worthy of consideration.' " *Spiegel v. Continental Illinois National Bank*, 790 F.2d 638, 650-51 (7th Cir. 1986), *cert. denied*, 479 U.S. 987, 107 S. Ct. 579 (1986) (quoting *Ruderer v. Fines*, 614 F.2d 1128, 1132 (7th Cir. 1980)).

The necessary prerequisites for awarding Rule 38 damages and costs to an appellee are well established. "In order to award Rule 38 sanctions, we must make two determinations: (1) the appeal is frivolous and (2) sanctions are appropriate." *Williams v. Leach*, 938 F.2d 769, 775 (7th Cir. 1991) (citations omitted). As to the first question, an appeal is frivolous when the " 'result is foreordained by the lack of substance to the appellant's arguments,' " *Williams*, 938 F.2d at 775 (quoting *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (en banc)) or " 'when it merely restates arguments that the district court properly rejected.' " *Mestayer v. Wisconsin Physicians Service Insurance Corporation*, 905 F.2d 1077, 1081 (7th Cir. 1990) (citation omitted).

Plaintiff's appeal of the district court's dismissal of the Sherman antitrust claim meets both these standards. The result of A-Abart's appeal of the dismissal of its antitrust claim was "foreordained" by the clear doctrine set out in *Business Electronics* and merely restated "arguments that the district court properly rejected." An appeal of the dismissal of a frivolous claim is frivolous.

A-Abart's other arguments on appeal were also frivolous. It failed to offer evidence of its reliance on Emerson's alleged promise to sell it the 552 ceiling fans, a necessary element of promissory estoppel, its only plausible basis for prevailing on its contract claim. A-Abart failed to address until its reply brief the doctrine of competitor's privilege, which provided Littman with a successful affir-

mative defense, both in the trial court and in this appeal, to the charge of intentional interference with prospective economic advantage. Even in its reply brief, A-Abart argued that Littman could be liable for this tort "even regardless and separate and apart from the antitrust aspects involved" and that the tort itself is "a form of unfair competition." But as we made clear earlier in the decision, echoing the district court's dismissal, the plaintiff's argument here necessarily depended upon a finding that Littman had committed an antitrust violation. Without such a showing, A-Abart could not demonstrate that Littman's conduct was unfair or illegal and thus outside the scope of the protection offered by the competitor's privilege.

Having decided that A-Abart's appeal was frivolous, we must now decide whether these are appropriate circumstances for the imposition of sanctions. "Sanctions are appropriate if 'the appeal was prosecuted with no reasonable expectations of altering the district court's judgment and for purposes of delay, harassment or sheer obstinacy.'" *Williams*, 938 F.2d at 775 (quoting *Reid v. United States*, 715 F.2d 1148, 1155 (7th Cir. 1983)).

In the instant case, "[n]ot only were these arguments properly rejected; they were so groundless as to be held sanctionable by the district court." *Mestayer*, 905 F.2d at 1081. Moreover, we conclude that "appellant's attorney could not have had a reasonable expectation that the same arguments would prevail in this court and merely delayed the inevitable by filing this appeal.' " *Id.* (quoting *Mays v. Chicago Sun-Times*, 865 F.2d 134, 139 (7th Cir. 1989)).

We have other reasons for awarding damages and costs in this case. A-Abart, in its brief to this court, calls our attention to *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3rd Cir. 1979) and notes that it was cited by the Supreme Court in *Business Electronics*, 485 U.S. at 742 n.4, 108 S. Ct. at 1529. But A-Abart failed to disclose that this citation was from the dissenting opinion in *Business Electronics*. Moreover, it is clear that the Supreme Court intended to overrule *Cernuto* in *Business Electronics*; the Court cited it as one of the cases representing

a split in the circuits that it settled in *Business Electronics*. *Cernuto* was quite emphatically on the losing side of that split. *Business Electronics*, 485 U.S. at 720 n.1, 108 S. Ct. at 1517. Nevertheless, the appellants lead their reply brief with a citation to *Cernuto*.[1]

Rule 38 damages and costs may be assessed against either an appellant or the appellant's attorney. *Mestayer*, 905 F.2d at 1081. In this case, the virtual repetition by the appellant's attorney of arguments properly rejected by the district court leads us to believe that we should assess attorneys' fees and other costs of this appeal against A-Abart's attorney. Pursuant to Circuit Rule 38, effective February 1, 1992, the appellant's attorneys may file a brief within 15 days of the date of this opinion to show cause why sanctions should not be imposed; Emerson and Littman are ordered to file with this court within the same 15-day period a statement of the attorneys' fees and other costs they incurred in defending this appeal.

VI.

We affirm both the district court's entry of summary judgment in favor of Emerson and Littman and its imposition of Rule 11 sanctions against A-Abart's attorney, and assess the costs of this appeal, including attorneys' fees, against A-Abart's attorney.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[1] As we discussed above, A-Abart included the same misleading citation in memoranda submitted to the district court.

APPENDIX C — PLAINTIFF-APPELLANT'S PETITION FOR REHEARING FILED MARCH 11, 1992

In the
UNITED STATES COURT OF APEALS
For the Seventh Circuit

Nos. 90-3751 and 91-2221

A-ABART ELECTRTIC SUPPLY, INCORPORATED,
Plaintiff-Appellant,

v.

EMERSON ELECTRIC COMPANY and LITTMAN BROTHERS ENERGY SUPPLIES, INCORPORATED,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING, AND BRIEF OF APPELLANT'S ATTORNEYS SHOWING CAUSE WHY SANCTIONS AND COSTS SHOULD NOT BE IMPOSED AGAINST SAID ATTORNEYS.

Now come A-BART ELECTRIC SUPPLY, INC. ("A-ABART"), plaintiff-appellant herein, and RUBEN, KAPLAN & ROSEN, and JOHN W. BOYLES, its attorneys, and respectfully showing cause why sanctions and costs should not be imposed against said attorneys under Circuit Rule 38 (effective February 1, 1992), respectfully petitions this Honorable Court for Rehearing and Reconsideration of its judgment entered on February 27, 1992 in connection with the above entitled appeals, affirming both the District Court's entry of summary judgment in favor of EMERSON and LITTMAN and its imposition of Rule 11 sanctions against A-ABART's attorneys, and assessing the costs of this appeal, including attorneys' fees, against A-ABART's

attorneys. In support of which objections to the imposition of Rule 11 sanctions, and plaintiff-appellant's Petition for Rehearing and Reconsideration, the plaintiff and its attorneys state as follows:

Since the proposed imposition of Rule 11 sanctions is necessarily tied to the merits and reasons for plaintiff-appellant's appeal in the first instance, this petition and brief will first address itself to plaintiff-appellant's request for rehearing and reconsideration.

I.

Why Plaintiff's Antitrust Action And This Appeal Is *Not* Frivolous, And Merits Rehearing And Reconsideration.

So that an unwitting injustice is not done by this Court to plaintiff and its counsel in this case by unfairly labeling this antitrust action and this appeal as "frivolous", it is important that this Court fully understand and appreciate the basis for this lawsuit; and why the plaintiff and its counsel in instituting and prosecuting this action, in good legal conscience and belief, felt that the *Business Electronics* case, 485 U.S. 717; 108 S. Ct. 1515 (1888), given the important factual differences and economic considerations involved that distinguished the A-ABART case from *Business Electronics*, was *not* a bar to this action, and that this was and is an appropriate and proper case for the application of the per se doctrine, or in the alternative for the imposition of antitrust liability against the defendants under the "rule of reason".

The factual record in the instant cause, carefully developed by discovery by plaintiff's counsel as detailed in plaintiff's briefs, is *not* similar to that involved in the *Business Electronics* case;

and that is the key difference that the District Court, and this Court in its opinion, have failed to adequately take into account.

The only factual similarity between this cause and the *Business Electronics* case is that both cases involve a concerted refusal to deal. Otherwise they are completely different.

In the *Business Electronics* case, the manufacturer, at the instance and request of an existing dealer terminated the dealership of another existing dealer because the terminated dealer was engaged in price cutting and "free riding" on the other dealer's investment in product promotion and educational services; certainly a valid business and economic reason for a manufacturer not to want to deal with such dealer.

In the A-ABART case, on the other hand, as clearly detailed in plaintiff's briefs, it is undisputed: (1) that neither LITTMAN BROS. or A-ABART were existing dealers of EMERSON; (2) that EMERSON in the process of bringing out a new line of ceiling fans that was priced substantially below the equivalent Casablanca ceiling fan carried by both A-ABART and LITTMAN BROS., specifically solicited both A-ABART and LITTMAN BROS., as well as others, to become dealers of and to sell the EMERSON ceiling fan line; (3) that A-ABART agreed to become a dealer of EMERSON's new ceiling fan line, and executed and delivered to EMERSON's Chicago area sales representatives (at his solicitation and request) an initial order to purchase 552 ceiling fans and related accessories; (4) that EMERSON, at the request and insistence of LITTMAN BROS., agreed with LITTMAN BROS. not to sell EMERSON's new fan line to A-ABART (which as previously noted was priced substantially below the comparative Casablanca ceiling fan line carried by A-ABART, LITTMAN BROS. and other ceiling fan dealers); (5) that EMERSON, by

reason of said Agreement with LITTMAN BROS. has refused to sell its new ceiling fan line to A-ABART; (6) that EMERSON, in addition to selling its ceiling fan line to LITTMAN BROS., which with its 11 retail store outlets in the Chicago area brackets and penetrates the entire Chicago area market for ceiling fans and is the principal competitor of A-ABART, has also been selling its new ceiling fan line to at least five (5) other competing local fan dealers in the Chicago area; and (7) that A-ABART has been and is being economically damaged in its trade and business by reason of said restraint (i.e. concerted refusal to deal).

This Court would seem to have taken the position, as did the District Court, that the *Business Electronics* case, supra, stands for the proposition that absent an agreement on price or price levels, that *every* vertical restraint of trade, regardless of the factual circumstances and the anticompetitive nature and economic effect of the restraint, cannot, by virtue of the decision in *Business Electronics* ever be deemed to be per se illegal, and must in *all* cases be governed by and tested by the rule of reason (which requires a showing that the challenged restraint has an adverse impact on competition in the relevant market).

Plaintiff would respectfully submit that it is highly doubtful that *Business Electronics,* or its progenitor *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977), were ever intended to go or do go that far, and take that inflexible a position. It is also doubtful, it is respectfully submitted, that this Court would take that inflexible a position unless it felt mandated by the Supreme Court's decision in *Business Electronics* to do so.

If that were the "immutable" rule, under all facts and circumstances, then a "tying arrangement" though clearly a vertical restraint, and one not involving price or price levels, could

never be considered a per se restraint, when in fact it is generally, with few exceptions, deemed to be a per se restraint.

In *Business Electronics,* 485 U.S. at 724, 108 S. Ct. at 1519, Justice Scalia, speaking on behalf of the majority of the court, and citing *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, at 58-59, and 97 S. Ct. 2549, at 2562, said, among other things:

> "We note that expecially in the vertical restraint context *'departure from the rule-of-reason standard must be based on demonstrable economic effect rather* than . . . . . upon formalistic line drawing.'" (Emphasis ours)

Justice Scalia's opinion further noted (quoting from *National Soc. of Professional Engineers v. United States,* 435, U.S. 679, 692, 98 S. Ct. 1355, 1365, 55 L. Ed. 2d 637 (1978)) that "agreements are per se illegal only if their 'nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'"

In addition,to justify the application of the per se doctrine the restraint must have a "pernicious effect on competition" and "lack any redeeming feature". See *Northern Pacific R. Co. . United States,* 365 U.S. 1, 5, 78 St. Ct. 514, 518, 2 L. Ed. 2d 545 (1958).

And as this Court itself has recognized in *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.,* 585 F.2d 821, 833 (C.A. 7, 1978):

> "But as the Court made clear in *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S. Ct. 705 3 L.Ed 2d 741 (1959), and *Radiant*

Appendix C

> *Burners, Inc. v. Peoples Gas Light & Coke Co.*, 365 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961) (per curiam), private antitrust suits need not be premised on "actual diminutions in market competition, so long as they involve anti-competitive conduct aimed at the plaintiff."

In his opinion Justice Scalia indicated that departure from the rule of reason standard in the context of a vertical restraint "*must be based on demonstrable economic effect rather than . . . . . upon formalistic line drawing,*" and that to justify application of the per se doctrine of illegality that the restraint has to be shown as "having a pernicious effect on competition" and be so lacking in redeeming value as to justify the application of the per se doctrine of illegality.

A close reading of Justice Scalia's opinion in *Business Electronics*, and the history of the per se doctrine of illegality in antitrust law, would seem to suggest and indicate that the rule enunciated in *Business Electronics*, to-wit: that the per se doctrine is not applicable to vertical restraints not involving price fixing or an agreement on price is not necessarily immutable and fixed in stone, and that in a given case application the per se doctrine might be proper if it could be shown that the restraint, within the factual context involved, has a demonstrable adverse economic and pernicious effect on competition, and is so lacking in redeeming value as to justify the application of the per se doctrine.

Plaintiff and its counsel respectfully believe and submit that the A-ABART case is such a given case, and that under the undisputed factual context here involved, that the restraint in this cause has a "demonstrable economic" and "pernicious" effect on competition, and is so lacking in any bona fide redeeming

qualities as to justify application of the per se doctrine.

The record does not disclose any bona fide business or economic reason for EMERSON's refusal to deal (which restraint was vigorously opposed both by EMERSON's national sales manager, Mr. Weber, and its Chicago area sales representative (Jim Ippolito) and which restraint was the product of the admitted agreement between EMERSON and LITTMAN whereby EMERSON agreed not to sell to A-ABART.

It has been, and is, the position of A-ABART that the restraint here involved is a pure "naked" restraint that has no redeeming features, since its only purpose and operative effect is and has been to foreclose A-ABART from an important and vital segment of the supplier market (for which there has been no substitute because the EMERSON ceiling fan line is priced substantially below the comparative Casablanca ceiling fan line), and thereby suppress and impair competition in the Chicago area market at the horizontal level between competitors (i.e. between A-ABART on the one hand, and LITTMAN BROS. and the other Chicago area dealers who are able to buy the Emerson ceiling fan line).

With all due respect and deference to the views expressed by this Court, and the position taken by the District Court, the problem here has been that the position taken by the District Court, and this Court in its opinion, contrary to the admonition of Judge Scalia, the emphasis has been based on "formal line drawing" (i.e. on whether the restraint here in question is vertical or horizontal), and no attempt has been made by the Court to discuss or deal with the demonstrable economic effect of the restraint within the factual context of this case, and the fact that said

restraint has no bona fide redeeming features to justify its existence.

The fact that the economic operative effect of the restraint here involved has been to foreclose A-ABART, without justification, from an important and vital segment of the supplier market (for which there is no substitute because the Emerson ceiling fan line is priced lower than the comparative Casablanca fan line), and to thereby suppress and impair competition, has neither been discussed or considered by the Court. Nor has there been any discussion or consideration given by the court as to whether the restraint here in question has any bona fide redeeming features to justify its existence.

The undisputed record also establishes that the "relevant market" in the instant cause affected by the "restraint" (concerted refusal to deal) is the Chicagoland area market. That is clearly spelled out in detail in plaintiff's briefs. No further inquiry is deemed to establish the "relevant market" affected by the restraint. That is why plaintiff's original brief suggested and submitted to this Court that even if in the alternative, the concerted refusal to deal here involved were to be scrutinized under the "rule of reason" that the restraint here fails to pass muster since there is no legal economic justification for it, and it clearly unreasonably restrains competition and constitutes an agreement in unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Neither the District Court, or this court in its opinion, have really dealt with that issue.

It is for the reasons noted above that plaintiff and its counsel have, from the inception of the case, taken the position that the factual context of the instant cause is clearly distinguishable from the facts in the *Business Electronics* case, and that the Supreme

Court's decision in *Business Electronics* is not a bar to the antitrust action in the instant cause. That is why plaintiff and its counsel instituted and have prosecuted the instant antitrust action, and the within appeal.

One of the reasons advanced by the District Court, and this Court, for the imposition of sanctions against counsel for plaintiff, was that counsel in its briefs quoted from *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3rd Cir., 1979), and supposedly thereby misled the Court by not informing the court that the majority opinion in *Business Electronics* has rejected the *Cernuto* decision. Nothing could be further from the truth. Plaintiff's counsel quoted from *Cernuto* because its reasoning made sense and helped explain plaintiff's position. At no time, however, did plaintiff's counsel in their briefs ever represent that the language quoted had been adopted by the majority opinion in the *Business Electronics* case. While both the majority and dissenting opinions in *Business Electronics* have reference to the *Cernuto* case in their footnotes, and while plaintiff's brief attempted to reconcile the views therein expressed, at no time did plaintiff's counsel ever represent that the majority opinion in *Business Electronics* had ever adopted the position taken by the Third Circuit Court of Appeals in the *Cernuto* case. That would have been stupid, because a plain reading of the *Business Electronics* case indicates on its face that the majority opinion did not accept the position of the Third Circuit (as reflected in the *Cernuto* case) and the Ninth Circuit (as reflected in *Zidell Explorations, Inc. v. Conval Int'l Ltd.*, 719 F.2d 1465, 1469-1470 (CA 9, 1983).

The principal reason cited by the District Court, and this reviewing court, for imposing Rule 11 sanctions against plaintiff's counsel is that plaintiff's lawsuit is supposedly without merit and frivolous because its antitrust claim flies in the face of the *Business*

Electronics decision. That view does a great injustice to plaintiff and its counsel.

The fact is that at no time did plaintiff or its counsel ever contend or say that the *Business Electronics* decision was wrong, and at no time did plaintiff or its counsel ever misrepresent the import of the *Business Electronics* decision. On the contrary, as previously noted, within the factual context of that case involving as it did "price cutting" and "free riding" by a discontinued dealer, that decision made valid business and economic sense in holding that under those circumstances the manufacturer's refusal to deal made valid business and economic sense, and did not warrant the application of the per se doctrine.

All that plaintiff has been contending, is that given the undisputed different factual context present in the A-ABART case, and the demonstrable unwarranted anticompetitive economic effects of the restraint here involved, and the demonstrable pernicious effect on competition and lack of any redeeming feature of said restraint, is that the decision in the *Business Electronics* case, for the reasons hereinabove spelled out in detail, should not be a bar to A-ABART's antitrust action in the instant cause.

Even if this Court accepts the proposition that, absent an agreement on prices or price levels, that *every* vertical restraint of trade (regardless of the factual circumstances and the anticompetitive nature and economic effects of the restraint) cannot ever be deemed to be a per se violation of Section 1 of the Sherman Act, — what great legal sin, heresy, or apostasy in legal advocacy did plaintiff and its counsel commit in taking the position that it did that the decision in *Business Electronics* was not and should not be a bar to plaintiff's antitrust claim?

Appendix C

As Justice Kanne commented during the course of oral argument in this cause, should the two dissenting justices of the Supreme Court in the *Business Electronics* case have been subjected to "sanctions" for differing with their brethren on the Court?

Heaven help us if the legal profession and the judiciary have reached a point where good faith legal advocacy sanctioned by Rule 11, even if in a losing cause, is a mortal sin punishable by sanctions or the threat of sanctions!

It is respectfully submitted that imposing sanctions and taxing the costs of this appeal upon plaintiff's counsel would do a great injustice and impose an unwarranted and undue financial burden on plaintiff's counsel.

It is respectfully submitted that the insitutution and prosecution of this lawsuit, and the prosecution of the within appeal, by plaintiff's counsel has been in good faith and with conscious regard for the efficacy of the law, and does not warrant, in all fairness, the unwarranted and unfair approbation of being considered "frivolous". Such unwarranted approbation unfairly besmirches the reputations of competent and able counsel who have practiced law for many years, and who for many years have had occasion to teach law at local colleges or universities, and who pride themselves on their professional integrity. They just don't undertake "frivolous" lawsuits!

II.

The Court's Ruling Relating To Count II Of Plaintiff's Complaint.

In its opinion, this court, with reference to Count II of

plaintiff's Complaint, states that A-ABART "failed to offer evidence of its reliance on EMERSON's alleged promise to sell it the 552 ceiling fans, a necessary element of promissory estoppel", and raised a question as to whether Illinois recognizes the doctrine of promissory estoppel in contract actions. At page 38 of its original brief, plaintiff summarizes the facts relating thereto, and has reference to the purchase order dated November 18, 1988 (set forth at page 23 of the Appendix). In addition, during oral argument plaintiff's counsel called the Court's attention to the Illinois Supreme Court case of *Cross v. Weare Commission Co.*, 153 Il, 499 (1894), dated back to 1894, which held that "the statute of frauds cannot be interposed to defeat the application of the doctrine of estoppel". Plaintiff has nothing further to add in relationship to that issue.

Conclusion

WHEREFORE, for the reasons hereinbefore set forth, plaintiff and its counsel respectfully pray this Honorable Court to reconsider its judgment order and ruling of February 27, 1992, particularly with reference to its finding that the within lawsuit and appeal by plaintiff is "frivolous" and imposing sanctions by way of attorneys' fees and costs against said plaintiff's attorneys.

Respectfully submitted,

RUBEN, KAPLAN & ROSEN
and
JOHN W. BOYLES
Attorneys for Plaintiff-Appellant.

Appendix C

By: s/ Bernard M. Kaplan
One of Plaintiff-Appellant's
Attorneys.

Of Counsel:
Bernard M. Kaplan
John W. Boyles
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APPENDIX D — ORDER OF UNITED STATES COURT OF APPEALS DATED APRIL 23, 1992 DENYING PLAINTIFF-APPELLANT'S PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 23, 1992

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. HARLINGTON WOOD, JR., Senior Circuit Judge

A-ABART ELECTRIC SUPPLY, INCORPORATED,
Plaintiff-Appellant

Nos. 90-3751 and 91-2221 v.

EMERSON ELECTRIC COMPANY, and LITTMAN BROTHERS ENERGY SUPPLIES, INCORPORATED,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 C 10759, Harry D. Leinenweber, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellant, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

Appendix D

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX E — ORDER OF UNITED STATES COURT OF APPEALS DATED APRIL 23, 1992 AWARDING ATTORNEYS' FEES AND COSTS TO DEFENDANTS-APPELLEES

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 23, 1992

Before

Hon. John L. Coffey, Circuit Judge

A-ABART ELECTRIC SUPPLY, INCORPORATED, an Illinois corporation,

Plaintiff-Appellant

No. 90-3751 v.

EMERSON ELECTRIC COMPANY, (BUILDER PRODUCTS DIVISION), a Missouri corporation, and LITTMAN BROTHERS ENERGY SUPPLIES, INCORPORATED, an Illinois Corporation,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 C 10759, Harry D. Leinenweber, Judge

A-ABART ELECTRIC SUPPLY, INCORPORATED, an Illinois corporation,

Plaintiff-Appellant

and,

Appendix E

RUBEN, KAPLAN & ROSEN and JOHN W. BOYLES, counsel for A-Abart Electric Supply, Incorporated,

Appellants,

No. 91-2221 v.

EMERSON ELECTRIC COMPANY, (BUILDER PRODUCTS DIVISION), a Missouri corporation, and LITTMAN BROTHERS ENERGY SUPPLIES, INCORPORATED, an Illinois Corporation,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 88 C 10759, Harry D. Leinenweber, Judge.

This matter comes before the court for its consideration of the following documents:

1. "DEFENDANT-APPELLEE EMERSON ELECTRIC CO.'S STATEMENT OF ATTORNEYS' FEES AND COSTS" filed herein on March 13, 1992, by counsel for Littman brothers Energy Supplies, Inc.

2. "DEFENDANT-APPELLEE EMERSON ELECTRIC CO.'S STATEMENT OF ATTORNEYS' FEES AND COSTS" filed herein on March 13, 1992, by counsel for Emerson Electric Co.

On consideration thereof,

IT IS ORDERED that costs and fees are awarded to appellee Littman in the amount of $8,177.75.

Appendix E

IT IS FURTHER ORDERED that DEFENDANT-APPELLEE EMERSON ELECTRIC CO.'S STATEMENT OF ATTORNEYS' FEES AND COSTS is granted in part. The appellee Emerson Electric is GRANTED fees and costs in the amount of $15,654.53.

APPENDIX F — MEMORANDUM OPINION AND ORDER OF DISTRICT COURT JUDGE LEINENWEBER FILED NOVEMBER 30, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 88 C 10759
JUDGE LEINENWEBER

A-ABART ELECTRIC SUPPLY, INC., an Illinois corporation,

Plaintiff,

v.

EMERSON ELECTRIC CO., (BUILDER PRODUCTS DIVISION), a Missouri corporation; and LITTMAN BROS. ENERGY SUPPLIES, INC., an Illinois corporation,

Defendant.

[stamped]
Filed November 30, 1990
Judge Harry D. Leinenweber
U.S. District Court

MEMORANDUM OPINION AND ORDER

FACTS[1]

In 1988, Emerson Electric Co. ("Emerson"), a manufacturer

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[1] Local Rule 12(1) requires a party moving for summary judgment to file a statement of material facts as to which it contends that there is no genuine issue and which entitles the movant to a judgment as a matter of law. Local (Cont'd)

of electrical products, began to market a new line of ceiling fans nationally and in the Chicago area. A-Abart Electric Supply, Inc. ("A-Abart") and Littman Bros. Energy Supplies, Inc. ("Littman") are competitors who both sell ceiling fans at retail in the Chicago marketing area. Each have several separate retail store outlets in the Chicago area however, Littman with eight more stores is considerably larger, has a more aggressive growth plan, and has a more aggressive advertising program to support the introduction of a new product.

On September 8, 1988, representatives from Emerson met with Littman people to present Littman with a proposed marketing program for sale of its new line of ceiling fans. During this meeting, Littman asked Emerson the names of other local distributors who would be carrying its new line. Emerson advised that it intended to call on every retail seller in Chicago and a decision would be made to whom to sell at a later date by its corporate headquarters. Littman told Emerson at this meeting that if Emerson was going to sell its fans to its principle competitor, A-Abart, Littman would not be interested in carrying the new line because it would not

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(Cont'd)

Rule 12(M) requires a party opposing a motion for summary judgment to file a response to the Rule 12(1) statement and a statement of any additional facts which the respondent contends requires the denial of the motion. A-Abart, the original movant, has not filed a Rule 12(1) statement. Emerson and Littman have filed Rule 12(1) statements in support of their crossmotions for summary judgment. A-Abart has not filed any response to either Emerson's or Littman's Rule 12(1) statement. Consequently, Rule 12(m) deems the facts alleged in the Rule 12(1) statements to be admitted. Failure to file a Rule 12(1) statement constitutes grounds for but does not compel denial of a motion. It so happens however that the facts, with one exception pertinent to Counts II and III (*See supra*, p.6 n.2), are not seriously in dispute.

want to commit its advertising and marketing resources to bring a new product to market if there would not be a large enough market share available.

On October 18, 1988, Emerson met with A-Abart at its Chicago office, also to present its proposed marketing plan. Price lists and brochures were supplied, as well as purchase order forms. On November 18, 1988, A-Abart submitted a purchase order for 552 ceiling fans on the form provided by Emerson. The order allegedly had been solicited by a Chicago area sales representative of Emerson who, according to A-Abart's president, gave a verbal assurance that it would be accepted.

After the September 8th meeting there were no further discussions between Emerson and Littman until November 30, 1988, when the parties again met. At this meeting, Emerson informed Littman that it had decided to sell to Littman and not to sell to A-Abart. Emerson's decision to sell to Littman and not to sell to A-Abart. Emerson's decision to exclude A-Abart in favor of Littman was made prior to November 30, 1988. Although Emerson apparently intended to market its fans through other smaller retailers in the Chicago area, there is no evidence and A-Abart does not contend that there was any agreement between Emerson and Littman and any other retailer to exclude A-Abart. As a result of this decision by Emerson, A-Abart's purchase order was never filled. Emerson has denied that it entered into any contractual relationship with A-Abart or that it agreed to sell it any ceiling fans.

A-Abart has filed a three-count complaint, the first count alleging violation of the anti-trust laws against both Emerson and Littman, a second count alleging breach of contract against Emerson, and a third count alleging tortious interference with

existing and prospective contractual relationship and economic advantage against Littman.

A-Abart has filed a motion for partial summary judgment on Count I and a crossmotion for summary judgment on Count II. Emerson has filed a crossmotion for summary judgment on Count I and a motion for summary judgment on Count II. Littman has filed a crossmotion for summary judgment on Count I and a motion for summary judgment on Count III.

DISCUSSION

Count I

Anti-Trust

A-Abart characterizes its claim in Count I as "a clear, unmitigated case of an unlawful concerted refusal to deal" case, based on a conspiracy between a manufacturer and a dealer that the dealer would buy from the manufacturer only if the dealer "would not sell its electric ceiling fans to [A-Abart]." *Plaintiff's Memorandum, etc.*, p. 1. A-Abart makes no claim that the alleged conspiracy or agreement between Emerson and Littman included any agreement on price or price levels. A-Abart contends that this amounts to a *per se* violation of Section 1 of the Sherman Act (14 U.S.C. § 1). Unfortunately for A-Abart, this count, which appears to allege a vertical restraint, flies in the face of *Business Electronics v. Sharp Electronics*, 1089 S. Ct. 1515 (1988), a case that A-Abart did not attempt to distinguish or even cite until it prepared its reply brief.

Business Electronics simply holds that a vertical restraint of trade is not *per se* illegal unless it includes some agreement on

price or price levels. 108 S. Ct. at 1519-1525. Accordingly, the rule of reason applies to vertical restraints so a claimant must prove that under "all of the circumstances of a case . . . a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* at 1519. (Citation omitted). Therefore, the only two relevant questions are whether the restraint imposed by the alleged "conspiracy" between Emerson and Littman, is "vertical" or "horizontal" and, if vertical, whether the restraint the involves prices or price levels.

Restraints imposed by agreements between competitors are denominated "horizontal" and those imposed by agreements between firms at different levels as "vertical." *Id.*, at 1522-1523. Here, the restraint, i.e., the freezing out of A-Abart, is claimed to have been the product of an agreement between firms on different levels, i.e., Emerson, a manufacturer, and Littman, a retailer. Therefore, the restraint is vertical and the rule of reason applies because there is no contention that the restraint involves prices or price levels.

A-Abart makes a late attempt to distinguish *Business Electronics* by pointing out that the case involved an agreement between a supplier and a dealer to terminate another dealer rather than an agreement between a supplier and a dealer not to do business with another dealer, as is present here. A-Abart however makes no attempt to explain why one restraint is vertical and the other horizontal. It instead argues that this is a "group boycott" case and group boycotts are horizontal restraints according to *U.S. v. GMC*, 86 S.Ct. 1321 (1966), and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 79 S.Ct. 705 (1959). However, we need only refer back to *Business Electronics* to distinguish these two cases (and the other cases A-Abart cites): "[B]oth cases involved horizontal combinations — *General Motors, supra*, . . . at the

dealer level, and *Klor's, supra,* at the manufacturer and wholesaler levels." 108 S.Ct. at 1525. As we have seen, A-Abart makes no claim that any other retail dealer joined with Littman in urging Emerson to refuse to deal with A-Abart. So there is no horizontal aspect to the alleged conspiracy.

A-Abart's other antitrust argument is that since the restraint imposed by the agreement between Emerson and Littman has a horizontal effect, i.e., it hurts A-Abart, a competitor of Littman, it is itself horizontal and therefore entitled to *per se* illegality. *Plaintiff's Reply Memorandum, etc.,* p. 18. However, the very same argument was made by the dissent in *Business Electronics,* 108 S.Ct. at 1530-1531, and was disposed of by the majority at 108 S.Ct. at 1523 n.4. (a restraint is horizontal, not because it has horizontal effects, but because it is the product of a horizontal agreement).

A-Abart has neither attempted to demonstrate nor even pled that either Emerson or Littman possesses sufficient market power to make the restraint imposed by their agreement unreasonable. Accordingly, summary judgment in favor of Emerson and Littman and against A-Abart on Count I is appropriate. *Bi-Rite Oil Co., Inc., v. Ind. Farm Bureau Co-op. Ass'n., Inc.,* 908 F.2d 200, 203 (7th Cir. 1990).

COUNT II

Breach of Contract

In Count II A-Abart alleged that Emerson breached an

agreement to sell it 552 ceiling fans and accessories.[2] In response, Emerson has pleaded applicability of the statute of frauds of the Uniform Commercial Code as adopted in Illinois. Ill.Rev.Stat., ch.26, § 2-201. Section 2-201 makes a contract for the sale of goods for the price of $500 or more not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and is "signed by the party against whom enforcement is sought or by his authorized agent or broker."[3] The only "writing" alleged to exist by A-Abart is the purchase order tendered by it to Emerson. However, the purchase order was not signed by Emerson and thus does not qualify as a writing under the statute of frauds. A-Abart in its reply to Emerson's motion admits that no writing signed by Emerson exists but instead argues that the doctrine of promissory estoppel operates to bar Emerson from asserting this defense. A-Abart relies on *R.S. Bennett & Co. v. Economy Mechanical Industries, Inc.*, 606 F.2d 182, 187-89 (7th Cir. 1979), in which the Seventh Circuit predicated "without some difficulty" that the Illinois Supreme Court would allow a plaintiff to trump the statute of frauds with the promissory estoppel theory. Even though this predication was criticized in the later case of *Goldstick v. ICM Realty*, 788 F.2d 456, 464-465 (7th Cir. 1986), we do not have to make this decision because A-Abart has neither pleaded promissory estoppel nor

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2. The only serious dispute over the facts of which the court is aware is whether Emerson's agent verbally accepted A-Abart's purchase order for the 552 ceiling fans. Since the statute of frauds is involved, this "fact" is irrelevant. In any event, A-Abart did not set forth this fact in a Rule 12(1) statement. (*See infra*, p.1, n.1).

3. Another exception is found in Section 2-201(3)(b) where a "party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made . . . ." Emerson has made no such admission.

produced any evidence whatsoever that it acted or failed to act in some way detrimental to its best interests in reliance on the alleged promise of Emerson. *See Goldstick*, 788 F.2d at 465 ("For what it is worth the logic of such cases is that the element of reliance that is required to make a promise enforceable on grounds of estoppel takes the place of a writing . . .") Accordingly, the motion of Emerson for summary judgment on Count II is granted and A-Abart's crossmotion is denied.

Count III

Intentional Interference

There are two aspects to A-Abart's claim in Count III: (1) that Littman intentionally interfered with a contractual relationship that existed between Emerson and itself or (2) that Littman intentionally interfered with A-Abart's prospective economic advantage. A-Abart candidly admits that its first theory depends on the court finding a valid contract existing between itself and Emerson. Since the contract alleged in Count II fell at the hands of the statute of frauds, A-Abart's claim for interference with a contractual relationship also must fall because this tort depends on the existence of a valid and enforceable contract. *Belden Corp. v. Internorth, Inc.*, 45 Ill. Dec. 765 (1980).

The elements of the tort of interference with prospective economic advantage in Illinois are: (1) a reasonable expectancy of entering into a valid business relationship; (2) the defendant's knowledge of the expectancy; (3) an intentional interference by the defendant which prevents the expectancy from ripening into a valid business relationship; and (4) damage to plaintiff from such interference. *Tom Olesker's Exciting World of Fashion, Inc., v. Dunn & Bradstreet, Inc.*, 306 N.E.2d 549 (1974). However,

a party's prospective advantage is entitled to no more protection than the prospective advantage of any other party and competition is a defense, provided it is fair competition consistent with the antitrust law and other principles. *Candalaus Chicago v. Evans Mill Supply Co.*, 9 Ill. Dec. 62, 69-70 (1st Dist. 1977); *Frandsen v. Jensen-Sunquist Agency, Inc.*, 802 F.2d 941, 947 (7th Cir. 1986) (both cases citing *Restatement (Second) of Torts*, § 768 (1979).

A-Abart's claim is based on certain facts that tend to prove that Emerson sought out A-Abart as a possible dealer and distributor of its ceiling fans, supplied it with price lists and brochures, took credit information, and, apparently, solicited an order, leading it to believe that it would become an Emerson dealer, However, subsequently, Emerson made the decision to sell to Littman and not to sell to A-Abart, quite probably as a result of pressure from Littman.

As we have seen, Littman's agreement with Emerson, that A-Abart not be allowed to distribute the ceiling fans, was a vertical restrant and only illegal (and unfair) if it was proved to be anti-competitive, which A-Abart has neither charged nor tried to prove. Therefore, Littman's conduct has not been shown to amount to unfair competition and cannot be a basis for imposition of tort liability. *Bi-Rite Oil Co., Inc., infra.* Accordingly, summary judgment is appropriate on Count III in favor of Littman.

CONCLUSION

The amended motion for partial summary judgment of A-Abart on Count I is denied. The motion for summary judgment in favor of Emerson and Littman on Count I is granted. The motion for summary judgment of Emerson on Count II is granted. The motion for summary judgment of A-Abart on Count II is

dismissed. The motion for summary judgment of Littman on Count III is granted.

Judgment is entered in favor of defendants, Emerson and Littman, and against Plaintiff, A-Abart, and the cause of action of A-Abart in its entirety is dismissed with prejudice.

IT IS SO ORDERED.

s/ Harry D. Leinenweber
HARRY D. LEINENWEBER,
Judge
United States District Court

DATED: November 30, 1990

APPENDIX G — PLAINTIFF'S NOTICE OF APPEAL FILED DECEMBER 12, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 88 C 10759

[Stamped]
RECEIVED
DEC 12 1990
H. STUART CUNNINGHAM
CLERK, U.S. DISTRICT COURT

A-ABART ELECTRIC SUPPLY, INC., an Illinois corporation,
Plaintiff,

vs.

EMERSON ELECTRIC CO. (BUILDER PRODUCTS DIVISION), a Missouri corporation; and LITTMAN BROS. ENERGY SUPPLIES, INC., an Illinois corporation,
Defendants.

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Notice is hereby given that A-ABART ELECTRIC SUPPLY, INC., the plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, entered in this action on the 30th day of November, 1990.

Appendix G

(1) Denying plaintiff's Motion for Partial Summary Judgment against the defendants, EMERSON and LITTMAN, on Count 1 of plaintiff's Complaint (on the issue of liability);

(2) Granting the Motions for Summary Judgment of the defendants, EMERSON and LITTMAN, against the plaintiff, A-ABART, on Count 1 of plaintiff's Complaint;

(3) Denying plaintiff's Motion for Partial Summary Judgment against the defendant, LITTMAN, on Count III of plaintiff's Complaint (on the issue of liability);

(4) Granting the Motion for Summary Judgment of the defendant, LITTMAN, against the plaintiff, A-ABART, on Count III of plaintiff's Complaint.

(5) Granting the Motion for Summary Judgment of the defendant, EMERSON, against the plaintiff, A-ABART, on Count II of plaintiff's Complaint;

and entering summary judgment in favor of the defendants, EMERSON and LITTMAN, and against the plaintiff, A-ABART, and dismissing with prejudice the cause of action of the plaintiff, A-ABART, in its entirety.

The parties to the judgment and order appealed from, and the names and addresses of their respective attorneys are as follows:

Plaintiff:

A-Abart Electric Supply, Inc.

Appendix G

BERNARD M. KAPLAN of Ruben, Kaplan & Rosen, and JOHN W. BOYLES, 4711 Golf Road, Suite 403, Skokie, Illinois 60076, attorneys for plaintiff.

Defendants:

Emerson Electric Co.

ROBERT L. STOUT, JR. of Latham & Watkins, 5800 Sears Tower, Chicago, Illinois 60606, attorneys for Emerson Electric Co.

Littman Bros. Energy Supplies, Inc.

ANDREW B. DAVID, of Sugar, Friedberg & Felsenthal, 30 North LaSalle Street, Chicago, Illinois 60602, attorneys for Littman Bros. Energy Supplies, Inc.

Dated: December 12, 1990.

RUBEN, KAPLAN & ROSEN and JOHN W. BOYLES
By: s/ Bernard M. Kaplan
Attorneys for A-Abart Electric Supply, Inc., plaintiff-appellant.

APPENDIX H — TRANSCRIPT OF PROCEEDINGS BEFORE DISTRICT COURT JUDGE LEINENWEBER ON FEBRUARY 20, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 88 C 10759

Chicago, Illinois
February 20, 1991
9:00 o'clock a.m.

A-ABART ELECTRIC SUPPLY, INC., an Illinois corporation,
Plaintiff,

-vs-

EMERSON ELECTRIC COMPANY, BUILDER PRODUCTS DIVISION, a Missouri corporation, and LITTMAN BROS. ENERGY SUPPLIES, INC., an Illinois corporation,
Defendants.

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE HARRY D. LEINENWEBER

APPEARANCES:

For the Plaintiff: MR. BERNARD M. KAPLAN
(Messrs. Ruben, Kaplan & Rosen
4711 Golf Road, Suite 403
Skokie, Illinois 60076)

Appendix H

For the Defendants:

MR. ROBERT L. STOUT, JR.
(Messrs. Latham & Watkins
233 South Wacker Drive,
Suite 5800
Chicago, Illinois 60606)

MR. WILLIAM J. GIGLER
(Messrs. Sugar, Friedberg &
Falsenthal
30 North LaSalle Street
Chicago, Illinois 60620

Court Reporter:
JAMES W. CHEEK
Official Reporter
UNITED STATES DISTRICT COURT
219 S. Dearborn St. - Rm. 1714
CHICAGO, ILLINOIS

[2] THE CLERK: 88 C 10759, A-Abart vs. Emerson Electric

MR. STOUT: Good morning, your Honor. Robert Stout on behalf of the defendant, Emerson Electric Company.

MR. KAPLAN: Bernard M. Kaplan on behalf of the plaintiff.

MR. GIGLER: William Gigler on behalf of the defendant, Littman Bros.

THE COURT: This is on the petition for costs and Rule 11.

"In a memorandum opinion and order dated November 30, 1990, the Court entered judgment

in favor of defendants Emerson Electric Company and Littman Bros. Energy Supplies, Inc. dismissing the complaint in its entirety. Plaintiff has appealed the order. This cause is presently before the Court on Emerson and Littman's motions for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. Additionally, Emerson is seeking costs in the amount of $3,433.33 and Littman is seeking costs in the amount of $663.30. For the following reasons defendants' motions for sanction are granted. The Court has reduced Emerson and Littman's request for costs and awards Emerson costs in the amount of $3207.35 and Littman $527.30.

The mandate of Rule 11 is clear. Signature on a [3] "pleading, motion or paper consitutes a representation that to the best of the signer's knowledge, after a reasonable investigation, the paper is well grounded in fact and is warranted by existing law or that it represents a good faith argument for extension, modification or reversal of existing law. If a paper is filed in violation of Rule 11, the rule expressly provides that imposition of an appropriate sanction is mandatory.

Count I of the complaint alleges that Emerson, a ceiling fan manufacturer, agreed with a Littman, a dealer, to seel fans to Littman to the exclusion of plaintiff. The alleged agreement was admittedly an agreement between firms at different levels of distribution and thus characterized as a "verdical" agreement. At no time did plaintiff

allege that Emerson and Littman reached an agreement as to price or price levels. Therefore, it can readily be seen that the alleged agreement should be characterized as a vertical non-price agreement.

In moving for summary judgment, plaintiff asserted that this vertical non-price agreement was a per se violation of Section 1 of the Sherman Act. Inexplicably, in its brief in support of its motion, plaintiff failed to cite controlling United States [4] "Supreme Court authority holding that a non-price agreement between a manufacturer and a dealer regarding the manufacturer's dealings with another dealer was a vertical restraint, and therefore not per se illegal. See Business Electronics Corp. v. Sharp Elelctronics Corp., 485 U.S. 717 (1988). In Sharp the Court expressly stated, 'a vertical restraint is not illegal per se unless it includes some agreement on price or price levels.' At Pages 735-36. Plaintiff never argued that Sharp should be modified or re-examined. Moreover, in is brief in opposition to defendants' motions for sanctions, plaintiff itself point out that Sharp was decided 'some seven months prior to the institution of the within lawsuit by plaintiff.' See Plaintiff's response at Page 1.

It is unclear, however, whether plaintiff simply did not know of the existence of Sharp or if it knowingly failed to disclose the authority to the Court. If plaintiff knowingly failed to disclose adverse authority to the Court, it may well raise

ethical issues, but in either case plaintiff's conduct violates Rule 11. In Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073,. 1082 (7th Cir. 1987), the Seventh Circuit stated:

> [5] " 'When counsel represent something cleanly rejected by the Supreme Court is governing law, then it is appropriate to conclude that counsel are not engaged in trying the change the law; counsel are either trying to buffalo the Court or have not done their homework. Either way, Rule 11 requires the Court to impose a sanction . . .'

What is clear, is that plaintiff's assertion of per se illegality flew in the face of established precedent that is neither cited nor attempted to distinguish in its initial brief, causing the Court and the parties to waste valuable time evaluating a frivolous claim. When it finally attempted to distinguish Sharp, plaintiff simply pointed out that Sharp involved an agreement to terminate a dealer and that the instant case involved an alleged agreement not to deal with a dealer. Plaintiff nevertheless failed to explain why one restraint is vertical, that is, the one in Sharp, while the other one is horizontal, that is, in the instant case. At no time did plaintiff claim that other dealers joined with Littman, thus creating a horizontal agreement.

To make matters worse, plaintiff cited a case in its breif, Westman v. Hobart Corp. 461 F. Supp. [6] "627 (District of Colorado 1978), that it failed

to note had been reversed on appeal (796 F.2d 1216 10th Cir. 1986), and quoted cases and language from the dissent in Sharp as if from the majority opinion. Therefore, the Court concludes that plaintiff violated Rule 11. The Court will look to attorney's fees incurred by Emerson and Littman in connection with plaintiff's antitrust claim as a possible measure of sanctions. However, the Court cautions defendants that since plaintiff's arguments were so clearly contrary to Supreme Court authority, it would not expect to see excessively bloated fee statements in connection with plaintiff's antitrust claim, or the Court may look to another form of sanctions. See Franz v. U.S. Powerlifting Federalization, 836 F.2d 1063, at Page 1066 (7th Cir. 1987).

Defendants' request for costs pursuant to 28 U.S.C., Section 1920, Federal Rule of Civil Procedure 54(d), Local Rule 45 is not premature. The Court retains jurisdiction to assess costs even when a notice of appeal has been filed. Plaintiff objects to Emerson's request for costs associated with depositions because they were obtained purely for discovery purposes and were of no evidentiary significance. Although deposition transcripts are [7] "not specifically mentioned in Section 1920, the Seventh Circuit has held that deposition transcripts are taxable under Section 1920(2) as "stenographic transcripts." SK Hand Took Corp. v. Dresser Industries, Inc., 852 F.2d 936 (7th Cir. 1988); Hudson v. Nabisco Brands, Inc., 758 F.2d 1237, 1242-43 (7th Cir. 1985), overruled on other

grounds, Provident Bank v. Manor Steel Corp., 882 F.2d 258, (1989). The Court finds that he deposition transcripts were necessarily obtained for use in the case, see Local Rule 45(b), and thus that they can be properly taxed. To comply with this Court's orders, Emerson requested expedited delivery of the deposition transcripts. Such request was reasonable. Accordingly, Emerson is entitled to its actual cost of $2,762.10 associated with the deposition transcripts.

Finally, photocopying expenses associated with Emerson's pleadings are recoverable under Section 1920(4). Emerson seeks costs associated with copying 575 pages of pleadings and exhibits multiplied by four copies at $.25 per page for a total of $575.00 Emerson does not contend that this copying was done by an outside copying service, and the Court concludes that $.25 per page for its own [8] "internal copying machines is somewhat high.

Accordingly, the Court assesses 575 page multiplied by four copies at the rate of $.15 per page for a total of $345.00. Emerson has deleted $262.00 from its request of $363.25 associated with documents it produced to reflect plaintiff's payment to an outside copying service. Therefore, in summary, Emerson is awarded the following costs: $2762.10 (deposition transcripts), $345.00 (copies of pleadings and exhibits), and $100.25 (outside copying costs associated with document production) for total costs of $3207.35.

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> Littman is entitled to $323.30 associated with deposition transcripts and $204.00 for copying costs (1,360 total pages times $.15) for total costs of $527.30."

Emerson and Littman may file requests for fees pursuant to Rule 11 within two weeks. The plaintiff may have two weeks to respond to the requests. The Court will rule on fees in five weeks.

Do you want to give them dates?

THE CLERK: Two weeks for —

MR. KAPLAN: Your Honor, when will a written copy —

THE COURT: She is giving you the dates.

MR. KAPLAN: — of the order —

[9] THE COURT: Hold on. Wait a minute. She is giving the dates.

THE CLERK: Two weeks for the defendants' request for fees, March 6th, and March 13th for the response.

MR. STOUT: Your Honor, before we complete that, if I can interject for one moment, I wonder if we could have, perhaps, one additional week to file our fee petition? The only reason I ask that is we are currently trying to prepare our brief on appeal in response.

THE COURT: All right. Three weeks.

Appendix H

THE CLERK: March 13th.

MR. STOUT: Thank you.

THE COURT: Plaintiff may have two weeks to reply.

THE CLERK: March 27th.

THE COURT: Set it within, say, two weeks for ruling.

THE CLERK: April 10th for oral ruling, at 9:00 o'clock.

THE COURT: I would suggest that you read, defendants, Franz v. U.S. Powerlifting. It was a case, incidentally, where I was reversed.

MR. KAPLAN: Your Honor, may I make a comment?

THE COURT: Yes, sir.

MR. KAPLAN: With all due respect to the Court, I think the Court is compounding its initial error. The case is [10] up on appeal. The Appellate Court is going to decide whether or not we have a basis. There was a good faith attempt. I disagree with your findings on this. I think it's unfair, but that's beside the point. That is your ruling.

THE COURT: That is the ruling.

MR. KAPLAN: What it does is it uses a club to prevent us from getting a review but we're going to get reviewed no matter what happens.

THE COURT: You may do whatever you see fit, sir.

MR. KAPLAN: When will a copy of this be available? Because I am going to take it upstairs immediately.

THE COURT: Talk to the reporter. Make arrangements with the reporter.

MR. STOUT: Your Honor, if I could raise one other issue?

THE COURT: Yes.

MR. STOUT: We also had pending - you may recall, on, I believe it was, May 14, 1990 the Court had awarded attorney's fees as a sanction for plaintiff's failure to comply with discovery under Rule 37. We had, after that time, filed a fee petition, and that was fully briefed. I think the last time we were before your Honor we discussed getting a ruling date on that. I thought maybe it had been today. But I wanted to raise that as one other think for you to take into consideration.

[11] THE COURT: I will consider that at the same time as I consider the Rule 11.

MR. STOUT: Thank you, your Honor. It is already fully briefed in terms of the fee petitions and so on.

THE COURT: All right.

MR. STOUT: Thank you, your Honor.

(Which were all the proceedings had in the above entitled cause.)

Appendix H

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

s/ James W. Cheek
Official Court Reporter

Date: February 25, 1991

APPENDIX I — PLAINTIFF'S RESPONSE AND OBJECTIONS TO THE IMPOSITION OF RULE 11 SANCTIONS AND THE FEE REQUESTS OF DEFENDANTS' COUNSEL FILED MARCH 27, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88C10759
Judge Leinenweber

A-ABART ELECTRIC SUPPLY, INC.,

Plaintiff,

vs.

EMERSON ELECTRIC CO., et al.,

Defendants.

PLAINTIFF'S RESPONSE AND OBJECTIONS TO THE IMPOSITION OF RULE 11 SANCTIONS AND TO THE FEE REQUESTS OF DEFENDANTS' COUNSEL

Plaintiff, A-ABART ELECTRIC SUPPLY, INC. ("A-ABART"), by RUBEN, KAPLAN & ROSEN, and JOHN W. BOYLES, its attorneys, as and by way of response and objections to the imposition of Rule 11 sanctions and to the fee requests of defendants' counsel in connection therewith, respectfully state as follows:

In its remarks from the bench on February 20th, 1991, this Court, in indicating its intention to impose Rule 11 sanctions

against the plaintiff, unfairly leaves the impression that counsel for plaintiff either did not know of the existence of the *Business Electronics Corp. v. Sharp Electronics Corp.* decision of the United States Supreme Court, or failed to disclose the existence of that case to the Court, and that plaintiff, through its counsel, never argued that the *Business Electronics* case should be modified or re-examined.

Both of these observations are unwarranted and do a grave injustice to plaintiff and its counsel. So also is the characterization of plaintiff's lawsuit as a frivolous claim.

For the record, counsel for plaintiff was fully aware of the *Business Electronics* case at the time the instant lawsuit was filed, had analyzed and taken that decision into consideration at the time plaintiff's lawsuit herein was filed, and had come to the conclusion that the *Business Electronics* case was not dispositive of or a bar to the issues presented by the instant cause, given the particular factual circumstances that distinguish this case from the facts presented by the *Business Electronics* case, and the history and development of the "per se" doctrine of illegality.

Counsel for plaintiff is not a novice in the field of antitrust law. He has been teaching trade regulations and antitrust law for many years at one of the local universities and has had occasion to do some published writing in that field. He does not file frivolous lawsuits. He has too high a regard for the integrity of the law and of legal scholarship to do that.

Plaintiff counsel's argument and point was not that the *Business Electronics* case should be modified or re-examined, but that *Business Electronics* just did not apply because the factual circumstances between the instant cause and *Business Electronics*

were completely different; and that given the facts in the instant cause, and the history and nature of the "per se" doctrine of illegality, that the "per se" doctrine was properly applicable.

In *Business Electronics* the Supreme Court simply held that an agreement between a manufacturer and one of its dealers to terminate another dealer because of the latter dealer's price cutting or "free riding" should, in the absence of a price fixing agreement between the manufacturer and the first dealer, be governed by the "rule of reason", rather than under the "per se" doctrine, since in a given case there might be a valid business or economic reason or redeeming feature for such action.

Those are not the factual circumstances present in the instant cause. Admittedly, there was no price cutting or "free riding" (as in *Business Electronics)* upon the part of the plaintiff. Nor is there any bona fide redeeming business or economic reason to justify the restraint here involved (viz. the admitted agreement between Emerson and Littman that Emerson would not, at the insistence of Littman, sell its ceiling fan line to A-Abart). Rather what is involved here is plain and simply a "naked restraint", with no redeeming feature to justify its existence; whose only purpose and operative effect *is to foreclose the plaintiff from an important segment of the supplier market* for which (because the Emerson ceiling fan was priced substantially below the comparative Casablanca ceiling fan line) there has been no substitute and thereby suppress and impair competition at the horizontal level between competitors (i.e. between plaintiff and Littman), and thereby promote the growth of monopoly power by the largest ceiling fan dealer (Littman) in the Chicago area market.

The Court undoubtedly is, or should be, aware of the history

and application of the "per se" doctrine in antitrust litigation. Perhaps the best exposition of the doctrine of "per se" illegality, and its applicability to antitrust law, is that set forth by the United States Supreme Court in *Northern Pacific Railroad v. United States*, 365 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), where Justice Black, speaking for the Court, said:

> ". . . there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumes to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of "per se" unreasonableness . . . makes the type of restraints which prescribed by the Sherman Act more certain to the benefit of everyone concerned . . ."

Among those practices that have been treated as "per se" violations are price fixing (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); resale price maintenance (*Dr. Miles Medical Co., v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911); group boycotts or concerted refusals to deal both vertical and horizontal (see *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941), *Northwest Stationers v. Pacific Stationery*, 472 U.S. 284, 290 (1984); tying arrangements (see *International Salt Co. v. United States*, 332 U.S. 392 (1947); certain types of reciprocal dealing (see *United States v. Griffith*, 334 U.S. 100 (1948); and horizontal territorial or division of markets restraints (*Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226 (1983), cert. denied 474 U.S. 1053.

Appendix I

At one time, under *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), vertical territorial restraints were held to be "per se" illegal, but that much criticized decision was overruled in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) where the Court, recognizing that there might be redeeming features or valid economic reasons for a manufacturer to allocate and restraint dealers to particular territories, held that the rule of reason should govern the validity of such vertical territorial restraint.

The common thread or denominator to be found in all "per se" restraints is that they are inherently anticompetitive in nature and without any legitimate redeeming features to justify their existence. Whether the restraint is "vertical" or "horizontal" is important only insofar as the nature and form of the restraint lends itself to inherently anticompetitive conduct having no legitimate redeeming feature to justify its existence.

In *Business Electronics*, the Supreme Court simply held that in a fact situation involving an agreement between a manufacturer and one of its dealers to terminate another dealer because of the latter dealer's price cutting and "free riding", that, in the absence of a price fixing agreement (which in itself would be "per se" illegal) that the rule of reason, rather than the "per se" doctrine, should govern because under those factual circumstances there might be a valid and justifiable business or economic reason for the manufacturer to terminate the offending dealer. That is all that *Business Electronics* said and was intended to say. It did not immunize and was not intended to immunize all vertical restraints from the "per se" doctrine of illegality, particularly where the vertical restraint is inherently anticompetitive in nature and without any redeeming feature to justify its existence. Thus, by way of examples, a "tying arrangement" or a "resale price maintenance

agreement", though clearly vertical restraints are generally held to be "per se" restraints.

Even in *Business Electronics,* Justice Scalia writing for the majority of the Court noted (at 108 S.Ct. 1519) that the "per se" rule is appropriate where the conduct is manifestly anticompetitive, based on demonstrable econimic effect; a situation which counsel for plaintiff has respectfully submitted exists in the instant cause.

As noted in *FTC v. Indiana Federation of Dentists,* 476 U.S. 447 at 458 (1986), where the restraint does not merely "regulate" competition, but "suppresses and destroys competition", and has no redeeming deature to justify its existence, the "per se" doctrine of illegality is properly applicable.

This Court has seen fit to give the *Business Electronics* case an unwarranted narrow, if not superficial, construction that is inconsistent with the history and nature of "per se" restraints in antitrust litigation. It is also bad law because it fails to recognize the economically anticompetitive operative effect of the restraint here involved, and would leave an innocent plaintiff without a remedy.

It is for this reason, and not out of any lack of respect for the Court, that plaintiff has appealed this cause to the Seventh Circuit, where the record and briefs already on file, the appeal awaits oral argument.

Whether plaintiff is correct or in error in its construction of what the applicable law in the instant cause is or should be (and certainly its position is not frivolous given the legal research that went into the preparation of plaintiff's case and proof of

the facts alleged in the Complaint), or whether this Court may have erred in its interpretation and application of the *Business Electronics* case, a more basic concern and reason for not imposing Rule 11 sanctions in the instant cause, particularly in the light of the pending appeal, is the principle that Rule 11 sanctions should not be imposed or threatened to stifle legitimate good faith dissent, or to frustrate or discourage judicial review, where there is a good faith difference of opinion as to the construction of what the law is or should be. The imposition of Rule 11 sanctions under such circumstances does a great disservice to the judicial processes, and can only have a "chilling effect" thereon. It also fosters lack of collegiality between respective counsel.

Plaintiff's reply brief and memorandum, as this Court well knows, did discuss the *Business Electronics* case, and pointed out that the factual circumstances in that case were totally different from those present in the instant cause, and that the decision in *Business Electronics* in no way purported to overrule the principle enunciated in *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and other cases that certain concerted refusals to deal and group boycotts are "per se" violations of the Sherman Act.

Plaintiff's factual theory of the case, as set forth in its Complaint, was clear from its inception. It is alleged that the manufacturer, Emerson and Littman, a dealer who was plaintiff's principle competitor, had entered into an agreement, understanding and conspiracy wherein Emerson agreed with Littman that Emerson would not sell its new ceiling fan line to the plaintiff, A-Abart. It did not allege any price fixing arrangement between Emerson and Littman. Under these circumstances it certainly would have behooved counsel for respective defendants, or the Court for that matter, if they or it believed that *Business Electronics* was dispositive of the issues of the instant cause, either

on the Court's own motion or on motion of said defendants, to move to strike or dismiss plaintiff's Complaint on the ground that plaintiff, because of the *Business Electronics* case, did not state a cognizable cause of action. The issue would then have drawn at that point, and an immediate review by the Court of Appeals at that time (back early in 1989) would have determined whether the *Business Electronics* case was dispositive of and a bar to plaintiff's instant lawsuit.

Instead, because of the overly broad and less than discriminating range of discovery permitted the defendants in this cause, the plaintiff was subjected to an oppressive, time consuming, expensive and largely irrelevant discovery process involving the production of thousands of documents some 25 or 26 large boxes of plaintiff's business records going back to 1982 and thereafter, many of them of a highly confidential nature which was thereby disclosed to its principal competitor (Littman), having absolutely no bearing or relevancy to the issue of liability and as to what took place in the Fall and Winter of 1988 (which was the graveman of plaintiff's action) when Emerson and Littman entered into the agreement wherein Emerson agreed with Littman not to sell its new ceiling fan line to the plaintiff. Reviewing defendants counsels' application for fees, which are unreasonable, one finds that by far the bulk of the time alleged to have been spent by counsel purported to relate to the discovery processes and the issue of damages, and not to the issue of liability. If defendants' counsel were so cocksure that *Business Electronics* was dispositive of the instant lawsuit, as they now purport to be, then the time spent by defendants' counsel in connection with what would then have been a needless discovery process should not be compensable, even apart from the fact that Rule 11 sanctions are not warranted in the instant cause. Otherwise, what we have here is a miling of the discovery processes.

For all the foregoing reasons, plaintiff respectfully submits that defendants' application for attorneys' fees should be denied, and respecfully requests this Court to reconsider its ruling imposing Rule 11 sanctions in the instant cause.

Respectfully submitted,

s/ Bernard M. Kaplan
BERNARD M. KAPLAN
One of plaintiff's attorneys

BERNARD M. KAPLAN
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Attorneys for Plaintiff

APPENDIX J — MEMORANDUM OPINION AND ORDER OF DISTRICT COURT JUDGE LEINENWEBER ENTERED ON MAY 20, 1991 IMPOSING RULE 11 SANCTIONS AGAINST PLAINTIFF AND ITS COUNSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CASE NO. 88C10759
JUDGE LEINENWEBER

A-ABART ELECTRIC SUPPLY, INC., an Illinois corporation,

Plaintiff,

v.

EMERSON ELECTRIC CO. (BUILDER PRODUCTS DIVISION), A Missouri corporation; and LITTMAN BROS. ENERGY SUPPLIES, INC., an Illinois corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

On February 20, 1991, this court entered an order granting defendants', Emerson Electric Co. ("Emerson") and Littman Bros. Energy Supplies, Inc. ("Littman"), motions for sanctions pursuant to Rule 11. In granting the motions, the court expressly stated that it would "look to attorney's fees in connection with plaintiff's antitrust claim as a *possible measure of sanctions.*" *See* transcript of Oral Ruling, attached as Ex. A to Littman's Petition for Attorney's Fees at 6 (emphasis added). The court expressed concern that given the clarity of the Supreme Court

opinion in *Business Electronics*, it did not expect to see bloated fee requests. Additionally, the court indicated that it reserved the right to look to another measure of sanctions.

In response to that request, Littman seeks an award of $23,223.65 and Emerson seeks an awary of $69,825.50. The court notes that both defendants appear to have made attempts to limit their respective requests for fees to Count I of plaintiff's complaint, that is, the antitrust claim. Nevertheless, the court cannot ignore that plaintiff's complaint contained two other counts. Count II alleged a breach of contract and Count III alleged tortious interference with a business relationship. Obviously, defendants spent a significant amount of time addressing the latter two counts, as well as the antitrust claim, and neither count may be described as frivolous. In addition, defendants' discovery was directed at more than the antitrust claim, and would have been incurred irrespective of the antitrust claim.

The court now concludes that looking to defendants' attorney's fees is not a proper measure of sanctions. The court has determined that it is appropriate to order counsel for plaintiff to pay a fine of $2,500 to the Clerk of the United States District Court. *See Franz v. U.S. Powerlifting Federation*, 836, F.2d 1063, 1066 (7th Cir. 1987) ("[i]t is not written that what the offender surrenders the other side must receive. The court may impose as a fine any sum that is appropriate for deterrent purposes . . .").

The court previously held that defendants were entitled to their costs and attorney's fees in connection with their motion for sanctions regarding then-outstanding discovery. Accordingly, Littman seeks $11,004.15 and Emerson seeks $23,042.09 in connection with efforts to obtain plaintiff's compliance with discovery. In its oral ruling on May 14, 1990, the court stated,

"[d]efendant's are hereby awarded their costs and attorneys' fees *incurred in the prosecution of this motion.*" (emphasis added). Although defendants interpret this language to mean that they are entitled to attorneys' fees in connection with all attempts to obtain discovery dating back to November 1989, the court clearly ruled that they were entitled only to attorneys' fees and costs in connection with the Rule 37 motion for sanctions.

The court has reviewed the affidavit and time records of Littman's attorney, Andrew David ("David"), and has concluded that Littman is entitled to an award of attorney's fees for 12.7 hours work at the billing rate of $170.00 per hour. In reaching this figure, the court did not give credit to time entries labeled only "telephone call" to either the client or another attorney where the court could not conclude that the time was directly related to the Rule 37 motion for sanctions. Furthermore, the court concludes that 12.7 hours is more than reasonable in connection with one Rule 37 motion. Accordingly, Littman is entitled to an award of $2159.00 for attorney's fees in connection with the Rule 37 motion for sanctions.

Similarly, Emerson is entitled only to fees and costs in connection with the Rule 37 motion. Counsel for Emerson contend that they spent 69.25 hours for one Rule 37 motion. Furthermore, the court concludes that if Littman's counsel could complete the work in 12.7 hours, it is reasonable to allow Emerson attorney's fees for the same amount of time. As counsel for Emerson bill at the rate of $180.00 per hour, Emerson is entitled to $2286.00 for attorney's fees incurred in connection with the Rule 37 motion. Although Emerson requests costs in the amount of $548.59 in connection with its efforts to obtain plaintiff's compliance with Emerson's first set of interrogatories, such costs were not incurred

with respect to the Rule 37 motion for sanctions and are therefore denied.

In conclusion, Littman is awarded $2159.00 in connection with the court's May 14, 1990 order. Emerson is awarded $2286.00 in connection with the May 14, 1990 order. Finally, counsel for plaintiff is ordered to pay a fine of $2,500 payable to the Clerk of the United States District Court.

IT IS SO ORDERED.

s/ Harry D. Leinenweber
HARRY D. LEINENWEBER,
JUDGE
United States District Court

DATED: MAY 20, 1991

APPENDIX K — PLAINTIFF'S AND COUNSEL'S NOTICE OF APPEAL FROM ORDER OF MAY 20, 1991 FILED MAY 28, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 88 C 10759
(Judge Harry D. Leinenweber)

A-ABART ELECTRIC SUPPLY, INC.,
an Illinois corporation,

Plaintiff,

vs.

EMERSON ELECTRIC CO. (BUILDER PRODUCTS DIVISION), a Missouri corporation; and LITTMAN BROS. ENERGY SUPPLIES, INC., an Illinois corporation,

Defendants.

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Notice is hereby given that A-ABART ELECTRIC SUPPLY, INC., the plaintiff above named, and RUBEN, KAPLAN & ROSEN and JOHN W. BOYLES, its counsel, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final order of the United States District Court for the Northern District of Illinois, Eastern Division, entered in this action on the 20th day of May, 1991, imposing, by way of a Rule 11 sanction, a fine of $2,500.00 against counsel for plaintiff.

Appendix K

The parties to the order appealed from, and the names and addresses of their respective attorneys are as follows:

Plaintiff:

A-Abart Electric Supply, Inc.

BERNARD M. KAPLAN of Ruben, Kaplan & Rosen, and JOHN W. BOYLES, 4711 Golf Road, Suite 403, Skokie, Illinois, 60076, attorneys for plaintiff.

Defendants:

Emerson Electric Co.

ROBERT L. STOUT, JR. of Latham & Watkins, 5800 Sears Tower, Chicago, Illinois 60606, attorneys for Emerson Electric Co.

Littman Bros. Energy Supplies, Inc.

ANDREW B. DAVID, of Sugar, Friedberg & Felsenthal, 30 North LaSalle Street, Chicago, Illinois 60602, attorneys for Littman Bros. Energy Supplies, Inc.

Dated: May 28th, 1991.

RUBEN, KAPLAN & ROSEN
and JOHN W. BOYLES
By: s/ Bernard M. Kaplan
Attorneys for A-Abart Electric
Supply, Inc., plaintiff-appellant

Appendix K

[stamped]
PAID
MAY 28 1991
H. STUART CUNNINGHAM
Clerk, U.S. District Court
By s/ illegible

APPENDIX L — PLAINTIFF'S COMPLAINT FILED DECEMBER 23, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Docket No. 88C10759
Plaintiff Requests Trial By Jury

A-ABART ELECTRIC SUPPLY, INC., an Illinois corporation,

Plaintiff,

vs.

EMERSON ELECTRIC CO. (BUILDER PRODUCTS DIVISION), a Missouri corporation; and LITTMAN BROS. ENERGY SUPPLIES, INC., an Illinois corporation,

Defendants.

COMPLAINT

Now comes A-ABART ELECTRIC SUPPLY, INC., (hereinafter sometimes referred to as "ABART", an Illinois corporation, plaintiff herein, by RUBEN, KAPLAN & ROSEN and JOHN W. BOYLES, its attorneys, and complaining of the defendants, EMERSON ELECTRIC CO. (Builder Products Division) (hereinafter sometimes referred to as "EMERSON"), a Missouri corporation, and LITTMAN BROS. ENERGY SUPPLIES, INC. (hereinafter sometimes referred to as "LITTMAN"), an Illinois corporation, states as follows:

Appendix L

Count I

1. Plaintiff, A-ABART ELECTRIC SUPPLY, INC., is a corporation duly organized and existing under the laws of the State of Illinois, with its principal offices located at 3744 West Fullerton Avenue, Chicago, Illinois. Plaintiff is engaged, and has for many years been engaged, in the business of buying, selling and distributing, in interstate commerce, electric fans (primarily ceiling type fans and related accessories), which it sells both at retail and wholesale in various states throughout the United States as well as in Puerto Rico. Plaintiff presently have five (5) retail store outlets at which it sells electric fans, to-wit at 3744 West Fullerton Avenue, Chicago, Illinois; 1492 Waukegan Road, Glenview, Illinois; 1047 Dundee Road, Buffalo Grove, Illinois; 1073 North Salem Drive, Schaumburg, Illinois; and 2897 Ogden Avenue, Lisle, Illinois. Plaintiff does, and has done, a substantial volume of business relating to the sale of electric fans, and its marketing reputation and knowledge of the electric fan business is such that its recommendation and acceptabiility of a particular manufacturer's product line carries considerable weight in influencing other fan dealers to buy and carry such product line.

2. Defendant, EMERSON ELECTRIC CO. (Builder Products Division), is a corporation duly organized and existing under the laws of the State of Missouri, and is engaged, and has for many years been engaged in the business of manufacturing various electrical products, including electric ceiling fans (and related accessories), which it sells and distributes to dealers in interstate commerce throughout the United States, including the Chicago, Illinois metropolitan area and its immediate environs.

3. Defendant, LITTMAN BROS. ENERGY SUPPLIES, INC., is a corporation duly organized and existing under the laws

Appendix L

of the State of Illinois, with its principal offices located at 734 North Wells Street, Chicago, Illinois. Said defendant is a dealer in electrical supplies, and it engaged, and has for many years been engaged, in the business of buying and selling, in interstate commerce, electric fans, including ceiling type fans and related accessories, and is a principle competitor of the plaintiff.

4. The amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs. Jurisdiction herein is predicated on Section 4 of the Clayton Act (15 U.S.C. Section 15(a)).

5. That on or about the 18th day of October, 1988, the defendant, EMERSON, through Richard E. Weber, its national sales manager, solicited the plaintiff, at the latter's offices in Chicago, Illinois, to purchase and become a distributor and dealer of a new line of ceiling fans being manufactured by EMERSON. Said line of ceiling fans is reflected by EMERSON's distributor price schedule, effective November 1, 1988, given to Sargon Malik, the President of the plaintiff corporation, by Mr. Weber at the time he solicited the business of the plaintiff; a true photocopy of which is attached hereto and made a part hereof as plaintiff's exhibit No. 1.

6. That at the time that Mr. Weber, on behalf of EMERSON, solicited the plaintiff to purchase, and become a distributor and dealer of EMERSON's new line of ceiling fans, he represented to Mr. Malik of the plaintiff company as follows:

> (a) That EMERSON's new line of ceiling fans used the same type of motor (a model K-55 electric motor initially manufactured by EMERSON for and sold to the Casablanca Fan Company of

California for use in the fans manufactured by the latter firm), and had the same characteristics as the Delta II and other Casablanca lines of ceiling fans manufactured and sold by the Casablanca Fan Company, and would therefore be in direct competition with the Casablanca line of ceiling fans then carried by the plaintiff.

(b) That EMERSON was pricing its new line of ceiling fans at substantially lower prices than the plaintiff and other fan dealers were then paying for the Casablanca line of fans, so that if plaintiff did not carry the new Emerson line of ceiling fans, the plaintiff would be at a competitive disadvantage; given the fact that the Casablanca line of ceiling fans constituted the principal line of ceiling fans carried by the plaintiff, and what with the plaintiff being the largest dealer of Casablanca ceiling fans in the United States.

(c) That EMERSON was aware of the excellent marketing reputation that the plaintiff enjoyed among other fan dealers, and that if plaintiff were to agree to buy and carry the new Emerson ceiling fan line, as a dealer and distributor of that line, and if that fact were known to other fan dealers in the industry, it would undoubtedly enhance the receptivity of other fan dealers to buying the new line of Emerson ceiling fans.

7. That concurrently with said representations aforesaid, EMERSON, acting through its said national sales manager, Mr. Weber, presented to Mr. Malik of the plaintiff company a

brochure, which had been prepared in advance by EMERSON setting forth the prices and terms at which EMERSON was agreeable to selling its new ceiling fan line to the plaintiff; a true copy of which brochure is attached hereto and made a part of this Complaint as plaintiff's Exhibit No. 2.

8. That in reliance upon said representations, and plaintiff's Exhibit No. 1 and 2 given to the plaintiff, the plaintiff orally agreed, through said SARGON MALIK, its president, to become a dealer and distributor of EMERSON's ceiling fans, and EMERSON, acting through its national sales manager, the said Mr. Weber, agreed to sell its line of ceiling fans to the plaintiff at the prices and terms set forth in plaintiff's Exhibit No. 2.

9. That in furtherance of said agreement and understanding, EMERSON thereupon furnished the plaintiff with copies of the following literature and brochures relating to the EMERSON ceiling fans, to-wit:

(a) A brochure entitled "1989 Authorized Dealer Program II";

(b) A brochure entitled "Cooperative Advertising Program";

(c) A ceiling fan specifications sheet;

(d) A brochure entitled "Sales Promotion Materials";

and other promotional and informational literature; and the plaintiff, through its said Mr. Malik, filled out and furnished to EMERSON's sales representative, at the latter's request, a "New

Appendix L

Account Confidential Credit Information" sheet dated November 8, 1988, and a sales tax information sheet, true photocopies of which are attached hereto and made a part of this Complaint as plaintiff's Exhibits No. 3 and 4 respectively.

10. Thereafter on November 18, 1988, the plaintiff placed and transmitted to Jim Ippolito, the local sales representative of EMERSON, an initial ceiling fan purchase order (on a form that had been provided by EMERSON) for some 522 EMERSON ceiling fans and related accessories, a true copy of which order is attached hereto and made a part of this Complaint as plaintiff's Exhibit No. 5; and which order, the plaintiff is informed, was approved and accepted by EMERSON.

11. Thereafter, on or about December 7, 1988, Sargon Malik, the President of the plaintiff company, was advised in person by said Jim Ippolito, the sales representative of EMERSON, that although said order had been accepted by EMERSON, that he was now informed by EMERSON that EMERSON was rejecting the purchase order and had decided not to sell to the plaintiff, since EMERSON had now agreed, instead, to sell to plaintiff's competitor, LITTMAN, co-defendant herein, to the exclusive of the plaintiff.

12. That plaintiff is informed and believes, and hence states the facts to be on information and belief, that notwithstanding the refusal of EMERSON to sell its ceiling fan line to the plaintiff, that EMERSON is currently selling said line of EMERSON ceiling fans not only to LITTMAN, plaintiff's principal competitor, but also to other local fan dealers in the Chicago metropolitan area, including, among others, Lighthouse Lighting of Villa Park, Illinois, Fillmore Electric of Melrose Park, Illinois, and Crest Lighting of Orland Park and Chicago, Illinois, who were solicited

by EMERSON based on representations made by EMERSON to such other fan dealers that plaintiff had found said EMERSON ceiling fan line acceptable and was going to be a dealer of said EMERSON ceiling fans.

13. Plaintiff is informed and believes, and hence states the facts to be on information and belief, the EMERSON's refusal to sell and deal with the plaintiff, notwithstanding the contractual agreement entered into between the plaintiff and EMERSON, as alleged aforesaid wherein it was agreed that plaintiff would sell said ceiling fans to plaintiff, stems from a wrongful and unlawful refusal to deal upon the part of EMERSON, and from a wrongful and unlawful agreement, understanding, conspiracy and combination in restraint of trade existing between EMERSON and LITTMAN to the effect that EMERSON, as a condition of LITTMAN buying said EMERSON's line of ceiling fans, would not sell its ceiling fans to the plaintiff and would not have the plaintiff as a dealer of said EMERSON ceiling fans in order to foreclose the plaintiff from competing with LITTMAN in the sale of EMERSON ceiling fans. That EMERSON's refusal to deal with and sell its ceiling fans to plaintiff, and the agreement, understanding, conspiracy and unlawful combination between EMERSON and LITTMAN as alleged aforesaid, constitute an unlawful and illegal restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. Sec. 1).

14. That by said unlawful combination and conspiracy, and EMERSON's refusal to sell its ceiling fans to the plaintiff, the said defendants intend to injure and destroy, and have injured, plaintiff's business by preventing or barring the plaintiff from purchasing EMERSON ceiling fans from EMERSON for its business, and thereby seriously injuring plaintiff's ability to effectively compete with LITTMAN and other fan dealers in the

sale of electric ceiling fans. That this injury to plaintiff's business is the direct result of such illegal, malicious, and wrongful conspiracy and of the acts done in its furtherance; and if permitted to continue will result in a substantial loss of business and profits to the plaintiff in excess of the sum of ONE MILLION ($1,000,000.00) DOLLARS.

Wherefore, plaintiff, pursuant to the provisions of 15 U.S.C. Section 15 and 15 U.S.C. Section 26, prays as follows in relationship to Count I herein:

(a) That plaintiff have and recover from the defendants threefold the damages sustained by the plaintiff and the costs of suit, including a reasonable attorney's fee.

(b) That the Court grant the plaintiff such injunctive relief and other relief as may be appropriate in the premises, including a mandatory injunction requiring the defendants to cease and desist from their wrongful conduct and requiring EMERSON to sell its electric ceiling fan line or products to the plaintiff.

Count II

As and for Count II of plaintiff's Complaint, the plaintiff, complaining of the defendant EMERSON, states as follows:

1-2. The plaintiff realleges as paragraphs 1 and 2 of Count II of plaintiff's Complaint, as though set forth hac verba herein, paragraphs 1 and 2 of Count 1 hereinabove.

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3. The amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs, and jurisdiction herein on Count II of the within Complaint is predicated on diversity of citizenship between the plaintiff and EMERSON, pursuant to 28 U.S.C. Section 1332.

4-13. Plaintiff realleges as paragraphs 4 through 13 inclusive of Count II of Plaintiff's Complaint, as though set forth hac verba herein, paragraphs 4 through 13 inclusive of Count I hereinabove.

14. That by reason of the conduct and agreements between the plaintiff and EMERSON, as alleged in paragraphs 5 through 10 inclusive of Count II herein (which realleges and makes a part thereof of paragraphs 5 through 10 inclusive of Count I of said Complaint), a contractual relationship exists between the plaintiff and EMERSON which contractually obligates EMERSON to sell and deliver to plaintiff the 552 ceiling fans and related accessories reflected in plaintiff's Purchase Order dated November 18, 1988, identified as Plaintiff's Exhibit No. 5.

15. That EMERSON, in breach of said contractual relationship, has refused to sell and deliver to plaintiff the 552 ceiling fans and related accessories ordered by the plaintiff (and reflected in Plaintiff's Exhibit No. 5).

16. That by reason of said breach of contract by EMERSON, the plaintiff has suffered from EMERSON's failure to deliver to plaintiff the ceiling fans and related accessories ordered by plaintiff under its Purchase Order of November 18, 1988 (Plaintiff's Exhibit No. 5), estimated to be in excess of $100,000.00.

Wherefore, plaintiff prays judgment against the defendant, EMERSON ELECTRIC CO., on Count II herein for the damages

sustained by plaintiff by reason of EMERSON's breach of contract, as alleged aforesaid, with costs taxed against said EMERSON.

Count III

As and for Count III of plaintiff's Complaint, the plaintiff, complaining of the defendant, LITTMAN, states as follows:

1-3. The plaintiff realleges as paragraphs 1, 2 and 3 of Count III of plaintiff's Complaint, as though set forth hac verba herein, paragraphs 1, 2 and 3 of Count I hereinabove.

4. The amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs, and jurisdiction over the defendant, LITTMAN, as it relates to Count III herein, is predicated on the fact that this Court already has jurisdiction over said defendant under Count I of the within Complaint on the basis of the presence of a federal question, viz. the alleged violation of Section 1 of the Sherman Act (15 U.S.C. Sec. 1), to which LITTMAN is alleged to be a party; and has jurisdiction by reason thereof over said defendant to determine in the same proceeding non-federal issues which are ancillary to the federal issues presented by Count I of plaintiff's Complaint.

5-14. Plaintiff realleges as paragraphs 5 through 14 inclusive of Count III herein of plaintiff's Complaint, as though set forth hac verba herein, paragraphs 5 through 14 inclusive of Count I hereinabove.

15. That in and by said conduct upon the part of LITTMAN alleged in paragraphs 13 and 14 of Count III herein (which realleges paragraphs 13 and 14 of Count I Plaintiff's Complaint), the

defendant LITTMAN maliciously and tortiously interfered with plaintiff's existing and prospective contractual and economic relationship with EMERSON, and has caused EMERSON to wrongfully refuse to deal with and sell EMERSON ceiling fans to the plaintiff, to the damage of the plaintiff.

Wherefore, plaintiff prays for the following relief against the defendant, LITTMAN BROS. ENERGY SUPPLIES, INC., on Count III herein.

(a) That plaintiff have judgment and recover from LITTMAN the damages sustained by the plaintiff for reason of said defendant's malicious and tortious interference with plaintiff's existing and prospective contractual and economic relationship with EMERSON, together with plaintiff's costs.

(b) That plaintiff have and recover punitive or exemplary damages from the defendant LITTMAN by reason of LITTMAN's malicious and tortious conduct.

(c) That plaintiff have such injunctive and other relief in the premises as this Court may deem meet.

RUBEN, KAPLAN & ROSEN
and JOHN W. BOYLES

Appendix L

By: s/ Bernard M. Kaplan
Attorneys for A-ABART
ELECTRIC SUPPLY, INC.,
Plaintiff
4711 Golf Road, Suite 403
Skokie, IL 60076
(312) 679-6100

Appendix L

(Plaintiff's Exhibit 5, Emerson Builder Products Ceiling Fan Order Form — Omitted Here But Submitted Separately As Lodging Appendix)

APPENDIX M — PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANTS ON COUNT I OF PLAINTIFF'S COMPLAINT (AS IT RELATES TO THE ISSUE OF LIABILITY) FILED AUGUST 30, 1990 INCLUDING EXHIBITS ATTACHED TO AND MADE A PART OF SAID MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 88 C 10759
Judge Leinenweber

A-ABART ELECTRIC SUPPLY, INC.,

Plaintiff,

vs.

EMERSON ELECTRIC CO., et al.,

Defendants.

PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE DEFENDANTS ON COUNT I OF PLAINTIFF'S COMPLAINT AS IT RELATES TO THE ISSUE OF LIABILITY.

Now comes A-ABART ELECTRIC SUPPLY, INC., plaintiff herein (hereinafter referred to as "A-ABART"), by RUBEN, KAPLAN & ROSEN, and JOHN W. BOYLES, its attorneys, and with leave of Court first had and received, pursuant to Rule 56 of the Rules of Civil Procedure of the United States District Courts, respectfully moves this Honorable Court for the entry

of Summary Judgment in favor of the plaintiff and against the defendants, EMERSON ELECTRIC CO. (hereinafter referred to as "EMERSON") and LITTMAN BROS. ENERGY SUPPLIES, INC. (hereinafter referred to as "LITTMAN") on Count I of plaintiff's Complaint as it relates to the issue of liability on the ground (1) that it is undisputed as matter of fact that Emerson's refusal to sell its new line of ceiling fans to the plaintiff is predicated on an existing agreement, understanding and conspiracy between Littman and Emerson that Emerson would not sell its ceiling fan line to plaintiff as a condition of Littman purchasing said ceiling between Emerson and Littman constitues, as a matter of law, an unlawful concerted refusal to deal in "per se" violation of Section 1 of the Sherman Act (15 U.S.C. Sec. 1).

In support of which Motion, the plaintiff attaches hereto and makes a part hereof the following:

(1) The verified response of the defendant, Littman (by Benson Littman, its President) to Plaintiff's First Set of Written Interrogatories directed to Littman. (Plaintiff's Exhibit No. 1 herein)

(2) Pertinent excerpts from the deposition transcript of Benson Littman (the President of Littman), taken on July 30, 1990. (Plaintiff's Exhibit No. 2 herein)

(3) Pertinent excerpts from the deposition transcript of Bruce Littman (a Vice President of Littman) taken on July 30, 1990. (Plaintiff's Exhibit No. 3 herein)

(4) Pertinent excerpts from the *evidence* deposition transcript of Richard E. Weber (the then national sales manager of Emerson) taken on August 4, 1990: (Plaintiff's

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Exhibit No. 4 herein).

(5) The response of the defendant, Emerson, to Plaintiff's First Set of Written Interrogatories directed to Emerson. (Plaintiff's Exhibit No: 5 herein)

(6) A true copy of a certain letter dated December 5, 1988 from David L: Butts, Director of Marketing and Sales of Emerson addressed to Benson Littman of Littman Bros. (produced by Emerson in response to plaintiff's request for the production of documents). (Plaintiff's Exhibit No. 6 herein)

(7) Memorandum of James J. Ippolito (sales representative of Emerson) dated November 20, 1988 addressed to Dave Butts and Richard Weber of Emerson (identified by Messrs Ippolito, Weber, Butts and Sly in their respective depositions). (Plaintiff's Exhibit No. 7 herein)

(8) Pertinent excerpts from the deposition transcript of Patrick Sly (the then Vice President of Sales and Marketing for the Special Products Division of Emerson, and currently President of that division) taken on August 9, 1990. (Plaintiff's Exhibit No. 8 herein)

(9) A true copy of a certain inter-office memorandum dated December 19, 1988 addressed to Pat Sly (produced by Emerson in response to plaintiff's request for the production of documents). (Plaintiff's Exhibit No. 9)

In addition, the plaintiff herewith submits its Meomorandum of Law in support of its Motion for Partial Summary Judgment

on Count I of plaintiff's Complaint as it relates to the issue of liability.

I.

The Nature Of Plaintiff's Antitrust Action

The essence of Count I of plaintiff's Complaint is that the defendant, Emerson, the manufacturer of a new line of ceiling fans having the same characteristics as the competitive Delta II and other Casablanca line of ceiling fans sold by the Casablanca Fan Company (but being sold by Emerson at substantially lower prices than the plaintiff and other fan dealers were then paying for the Casablanca line of fans), and Littman, the principal competitor of the plaintiff in the Chicago Metropolitan area, have entered into an unlawful agreement and conspiracy between themselves wherein Emerson, by way of a concerted refusal to deal, agreed not to sell, and has refused to sell, said new line of ceiling fans to the plaintiff notwithstanding the fact that Emerson, prior to its entry into such agreement and conspiracy, initially solicited plaintiff to become a dealer and distributor of said Emerson ceiling fan line, and sells said line of ceiling fans to Littman and other fan dealers in the Chicago metropolitan area who compete with the plaintiff in the sale of ceiling fans.

Thus, paragraph 13 of Count I of plaintiff's Complaint alleges as follows:

> ". . . that Emerson's refusal to sell and deal with the plaintiff, notwithstanding the contractual agreement entered into between the plaintiff and Emerson, as alleged aforesaid wherein it was agreed that the plaintiff would be a dealer and distributor

of Emerson's line of ceiling fans, and that Emerson would sell said ceiling fans to plaintiff, stems from a wrongful and unlawful agreement, understanding, and conspiracy to the effect that Emerson, as a condition of Littoman buying said Emerson's line of ceiling fans, would not sell its ceiling fans to the plaintiff and would not have the plaintiff as a dealer of said Emerson ceiling fans in order to foreclose the plaintiff from competing with Littman in the sale of its ceiling fans to plaintiff, and the agreement, understanding, conspiracy and unlawful combination between Emerson and Littman as alleged afore said, constiture an unlawful and illegal restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.S. Sec.1)."

Paragraph 12 of Count I of plaintiff's Complaint further avers:

". . . that notwithstanding the refusal of Emerson to sell its ceiling fan line to the plaintiff, that Emerson is currently selling said line of Emerson ceiling fans not only to Littman, plaintiff's principal competitor, but also to other local fan dealers in the Chicago metropolitan area, including among others, Lighthouse Lighting of Villa Park, Illinois; Fillmore Electric of Melrose Park, Illinois; and Crest Lighting of Orland Park and Chicago, Illinois, who were solicited by Emerson based on represen tations made by Emerson to such other fan dealers that plaintiff has found said Emerson ceiling fan line acceptable and was going to be a

dealer of said Emerson ceiling fans."

Emerson's answer to paragraph 12 of Count I of plaintiff's Complaint "admits that it has accepted certain ceiling fan purchase orders from Littman, Lighthouse Lighting and Crest Lighting, and that it has not accepted any ceiling fan purchase orders from plaintiff".

Paragraph 6 of Count I of plaintiff's Complaint alleges, among other things:

> "6. That at the time that Mr. Weber (the national sales manager of Emerson), on behalf of Emerson, solicited the plaintiff to purchase, and become a distributor and dealer of Emerson's new line of ceiling fans, he represented to Mr. Malik of the plaintiff company as follows:
>
> (a) That Emerson's new line of ceiling fans used the same type of motor (a model K-55 electric mnotor) initially manufactured by Emerson for and sold to the Casablanca Fan Company of California for use in the fans manufactured and sold by the Casablanca Fan Company, and would therefore be in direct competition with the Casablanca line of ceiling fans then carried by the plaintiff.
>
> (b) That Emerson was pricing its new line of ceiling fans at substantially lower prices than the plaintiff and other fan dealers were then paying for the Casablanca line of fans,

> so that if plaintiff did not carry the new Emerson line of ceiling fans, the plaintiff would be at a competitive disadvantage; given the fact that the Casablanca line of ceiling fans constituted the principal line of ceiling fans carried by the plaintiff, and what with the plaintiff being the largest dealer of Casablanca ceiling fans in the United States."

The existence of an agreement, understanding and conspiracy between Emerson and Littman, as alleged in paragraph 13 of Count I of plaintiff's Complaint, that Emnerson, as a condition of Littman buying from Emerson, would not sell its electric ceiling fans to plaintiff, and that Littman would not buy from Emerson if Emerson sold its ceiling fans to plaintiff, is conclusively evidenced and confirmed by the evidence that has been adduced in this cause in connection with the discovery processes.

For one thing, it is reflected in Benson Littman's sworn response, on behalf of Littman, to plaintiff's Interrogatories No. 8 and 9 (a copy of which sworn response is attached hereto as plaintiff's Exhibit No. 1) as follows:

> "*Interrogatory No. 8:*
>
> "Did Littman, in connection with its agreement to become a dealer or distributor of Emerson's electric ceiling fans, or as a condition of buying such fans from Emerson, ever request Emerson not to sell Emerson's electric ceiling fans to A-Abart?"
>
> *Response to Interrogatory No. 8:*

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"Littman advised Emerson that it was interested in Emerson's line of ceiling fans, but they would not buy the line if Emerson sold it to A-Abart."

* * *

Interrogatory No. 9:

"Has Emerson ever agreed with or pomised Littman not to sell Emerson electric ceiling fans to A-Abart and, if so, when?"

Response to Interrogatory No. 9:

"By letter dated December 5, 1988, David L. Butts of Emerson advised Littman that Emerson had decided to limit the scope of marketing of its electric fans in the Chicago metropolitan area."

It is further reflected by the testimony given by Benson Littman, during the course of his deposition on July 30, 1990. While testifying as to Littman's first meeting with representatives of Emerson on September 8, 1988, he testified among other things, that he inquired of the Emerson people as to whom would be carrying the Emerson fan line in Chicago, and stated:

"A. Our position was that if there was — if they were going to be calling on A-Abart Electric that we would not be interested in carrying the line.

Q. Did you give them a reason for it?

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A. We probably said that we would not be willing to commit the resources necessary to bring a new product to market if — if we couldn't get our — if there wasn't going to be enough market share".

(See page 71 of Benson Littman's deposition - Plaintiff's Exhibit No. 2 herein)

* * *

(Then again at page 75 of said deposition)

"Q. Is there any reason why you made that statement to Emerson at that meeting?

A. What do you mean?

Q. What was the reason for making that statement to Emerson? What reason did you have for making that statement?

A. The reason — well, we — just as I stated before, we were not willing to commit the resources necessary to bring a new product to market for not enough market share".

Q. Was it your feeling that if Abart were competing with you for that market that it wouldn't be worthwhile for Littman to carry the line?"

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Then followed a series of objections by defendants' counsel)

* * *

(Then again at page 80 of said deposition)

"A. You asked me why I didn't — I wasn't going to be interested in the line —

Q. Yes.

A. — if they were going to sell to Abart? I believe I answered that twice. That was my reason. That was why I wasn't interested in the line, if they were going to sell to Abart."

* * *

(Then again at page 84 of said deposition)

"Q. Who brought up the name of Abart?

* * *

A. I believe it was us.

* * *

(Then again at page 86 of said deposition)

"A. They (Emerson) probably asked why we

wouldn't be interested in the line if they sold to Abart.

Q. Okay. That's your recollection of what they asked you?

A. Yeah.

Q. And do you recall what response, if any, you gave to that question?"

(Thereupon followed a series of objections by defendants' counsel so that the question was not answered, and the question was certified by plaintiff's counsel)

* * *

(Then at page 114 of said deposition, referring to a meeting held at Emerson's offices in St. Louis, Missouri on November 30, 1988 at which Benson Littman was present)

"Q. Was it your understanding at this meeting that Emerson would not sell to Abart?

A. It was my understanding that they were not going to sell to Abart at that point, yeah.

Q. What did you base that understanding upon?

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A. They told me who they would be selling in Chicago. And since Abart's name wasn't one of them, I took that to assume that they were not going to be selling them."

(Referring to the previously noted meeting held on September 8, 1988 at Littman's downtown location (at which meeting Bruce Littman, Benson Littman and Dan Littman of Littman Bros., and Richard Weber, Pat Sly and David Butts of Emerson were present), Bruce Littman (the father of Benson Littman and a Vice President of Littman Bros.) testified under oath)

"Q. . . . Do you recall either you or your son or anybody else from your family mentioning anything at this meeting about Abart?

A. I think it was Benson said to them early in the conversation that we would not be interested in the line if they were going to sell it to Abart."

"Q. What was the reason why you made — that statement was made to Emerson that if they sold to Abart you would not buy?

A. What was the reason that Benson made the — made the statement?

Q. Yes.

A. Well, for the reason he said in his testimony.

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Q. Which was what?

A. That it just — it did not want to commit our resources to bring a new product to the marketplace if the return wouldn't be there.

Q. Well, how would the return be affected by whether Abart was sold or not sold?

A. Just market share.

Q. In other words, do I read you correctly that if they also sold Abart that the share of the market that you would hope to get by carrying the Emerson line would be less than you would otherwise want; is that a fair statement?

A. I'm not — the question is a little, little difficult for me".

(See Pages 20-24 of Bruce Littman's deposition. Plaintiff's Exhibit No. 3 herein)

The existence of an agreement, understanding and conspiracy between Emerson and Littman, as alleged in paragraph 13 of Count I of plaintiff's Complaint, that Emerson, as a condition of Littman buying from Emerson, would not sell its electric ceiling fan line to plaintiff, and the evidentiary background relating thereto, is also conclusively established by the evidence deposition of Richard E. Weber, the former national sales manager of Emerson (whose job was terminated in May of 1989), pertinent portions of whose testimony relating thereto are set forth at pages

24-28, pages 39 through 42, and pages 58 through 63 of Weber's deposition transcript (attached hereto and made a part hereof as plaintiff's Exhibit No. 4).

Mr. Weber testified that he agreed with the views expressed by Jim Ippolito (the Chicago area sales representative of Emerson) in a certain memorandum dated November 20, 1988, which he had received from Ippolito, addressed to Richard Weber and David Butts (a true copy of which is attached hereto as plaintiff's Exhibit No. 7) that it would be a mistake for Emerson to pursue a marketing policy of selling its ceiling fans to Littman to the exclusion of Abart; but that his objections were overriden by Patrick Sly and David Butts (his superiors) who opted to go along with Littman's demand and requirement that Emerson not sell to Abart as a condition of Littman buying from Emerson. (See pages 39 through 42, and pages 58 through 63 of Weber's deposition testimony, plaintiff Exhibit No.4, and the Ippolito memorandum, plaintiff's Exhibit No. 7).

Referring to the afternoon meeting of November 30, 1988 held at the offices of Emerson in St. Louis, Missouri, Mr. Weber testified as follows:

> "Q. Now lets get to this meeting in the afternoon of November 30th. This meeting was held at Emerson's office, right?
>
> A. Yes.
>
> Q. And who was present at this meeting?
>
> A. Myself, Jim Ippolito, Jane Smith, Pat Sly, Dave Butts, Frank Frederick, Vern Cunningham

and possibly Ed Springer.

Q. All right. Now, anybody from Littman Brothers?

A. And the two Littman, Benson and Danny.

Q. Okay. And what discussions took place at that meeting?

A. We discussed in general — Mr. Butts made a presentation as to the fan line and Mr. — I guess it was the older one, Benson Littman, pretty much led the discussion for their part.

Q. What did he have to say?

A. Implied what they could do for us in the Chicago market and in the Milwauee market and —

Q. Exactly what did they say as best you can recall?

A. Well, that through their marketing, the fact that they had so many stores and that they did a lot of advertising that they would be able — they would be able to cover the market for us and give us distribution throughout the entire marketing area and that they were ready to write an order, they had brought orders with them and that they were ready to write an order, to give us an order right now and were willing to negotiate.

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Q. All right. What do you mean by — your understanding of the phrase "were willing to negotiate"?

A. We discussed — I don't remember the details of what was actually discussed. We discussed advertising, as to what they would do for us, and what percentage they would get; shipments to their single warehouse instead of to the thirteen warehouses. They also discussed how many sample fans they would get, and they negotiated that with Mr. Butts as to the fans per store. We discussed how many catalogs they would need. And then Mr. Littman asked us regarding the distribution, and one of the key things he said, "This is conditioned on that you do not sell A-Abart."

Q. He made that statement?

A. Yes.

Q. All right. And that statement was made in the presence of the various parties that you have listed?

A. Yes. Mr. Sly may not have been there at that time because he — I believe he excused himself and left to go back to his office on other business, so he may not have been there at that time.

Q. Mr. Butts was there?

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A. Yes.

Q. And you were there?

A. Yes.

Q. All right.

A. Mr. Ippolito.

Q. And Ippolito?

A. And Jane Smith. Right.

Q. All right. And when Benson Littman made that statement what response if any was made by Mr. Butts?

A. I couldn't tell you the exact words. It was basically an agreement that, yes, we can do that.

Q. "Yes, we can do that"?

A. I don't know the exact words.

Q. But it was an affirmative response?

A. I don't know if there was "agreement," but an affirmative response to that.

Q. And when that affirmative response was given by Mr. Butts was there any further conversation with Littman regarding this?

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A. Well, I had mentioned the negotiation regarding quantities of fans. That all occured in that meeting. I can't give you the exact sequence of events. So that's some of the negotiations, for quantities of fans, for samples and things, might have occured after that statement was made. That was kind of a key statement, it may have been made early in the conversation, and then the rest of the negotiations proceeded fron there because I believe it was a condition that if we — if we agreed to that, then we could go on to the rest, and since it was agreed or an affirmative answer to his condition —

Q. Let me ask you this; in your role as national sales manager and setting up systems of distribution for the Emerson fans in various parts of the country had you encountered a similar type of situation among others in your other territories?

MR. STOUT: I object to the form of the question, "similar type of situation."

MR. KAPLAN: He know what I'm talking about.

MR. STOUT: I object to the form of the question.

A. here was only one other city in which we had a — told someone we could not sell them, and that was in Kansas City where we had two distributors, one who said, "I won't buy if you

sell to him." And he said, "I won't buy if you sell to him." And it was a decision made on our — on my part and the rep from that area to say, "We'll sell to A instead of to B." That was the only other place we had that situation. A lot of people throughout the United States try to condition you with "I won't sell to him and I won't sell to him," but you try to address that.

Q. (by Mr. Kaplan) In fact, you try to avoid it?

A. Right.

Q. All right. Let me refer you to Plaintiff's Exhibit No. 6 where it says — the letter of Butts dated December 5th — "Littman will be our primary Chicago/Milwaukee dealer. The number of dealers will be restricted to allow everyone to maintain margins." What did that language mean to you?

MR. STOUT: Objection. Lack of foundation. Document speaks for itself.

MR. KAPLAN: He has some understanding of it.

Q. (by Mr. Kaplan) What does that mean to you?

MR. STOUT: Object to the form, no foundation for the question.

A. It's difficult for me to think what was in Mr. Butt's mind, but he was basically assuring Mr. Littman —"

Also reflecting the existence of an agreement, understanding and conspiracy between Emerson and Littman under which Emerson, at the insistence of Littman, agreed not to sell its ceiling fan line to A-Abart, is Emerson's response to plaintiff's Interrogatories No. 9 and 10 (included herein in Plaintiff's Exhibit No. 5), as follows:

"*Interrogatory No. 9:*

"Does Emerson have an agreement or understanding with Littman wherein Emerson has agreed not to sell its electric ceiling fan line to A-Abart?"

Response To Interrogatory No. 9:

"Emerson states that it has decided to limit the scope of marketing of its electric fans in the Chicago metropolitan area and has informed Littman of its decision."

Interrogatorry No. 10:

"If the answer to Interrogatory No. 9 is in the affirmative, indicate whether said agreement is in writing or is reflected by any memorandum of understanding between Emerson and Littman."

Response To Interrogatory No. 10:

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"Emerson states that by letter dated October 5, 1988, David L. Butts of Emerson informed Littman that Emerson had decided to limit the scope of marketing of its electric fans to the Chicago metropolitan area."

Emerson's letter of December 5, 1988 from David L. Butts, Director of Marketing and Sales of Emerson, addressed to Benson Littman, is attached hereto and made a part of the within Motion as Plaintiff's Exhibit No. 6.

In and by said Emerson's response (see Plaintiff's Exhibit No. 5) to plaintiff's Interrogatories No. 7 and 8 of Plaintiff's First Set of Written Interrogatories, set forth below, Emerson has also admitted that Emerson is selling its line of ceiling fans to other ceiling fan dealers in the Chicago metropolitan area:

"*Interrogatory No. 7:*

"Is Emerson currently selling its line of electric ceiling fans to other local electric ceiling fan dealers in the Chicago metropolitan area?"

Response To Interrogatory No. 7:

"Yes."

"*Interrogatory No. 8:*

"If the answer to Interrogatory No. 7 is in the affirmative, state the names and addresses of all such other dealers to whom Emerson is selling its line of electric ceiling fans, and when such sales

were made."

Response To Interrogatory No. 8:

"Crest Lighting Studio
13400 S. Cicero Avenue
P. O. Box 549
Crestwood, IL 60445

Helsel Jepperson
197th & S. Halsted
Chicago, IL 60411

Grand Lighting Gallery
1811 Grand Avenue
Waukegan, IL 60085

Lighthouse Lighting, Inc.
25 W. St. Charles Road
Villa Park, IL 60181

Littman Brothers Energy Supplies
730 N. Franklin Street
Suite 710
Chicago, IL 60610

Raycon Lamp & Lighting Gallery
1735 S. Roselle Road
Schaumburg, IL 60172."

Note also that Emerson, in its response to plaintiff's Interrogatories Nos. 3 and 5 (Plaintiff's Exhibit No. 5), has also taken the position that it has not and will not sell its ceiling fan

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line to the plaintiff; a position reiterated as recently as August 9, 1990 by Patrick Sly (currently President of the Special Products Division of Emerson) in connection with his deposition of that date (see Plaintiff's Exhibit No. 8 attached hereto and made a part hereof).

Plaintiff respectfully submits that what we have here in the instant cause is a clear, unmitigated case of an unlawful concerted refusal to deal, based upon an explicit agreement, understanding and conspiracy between Emerson and Littman.

It is further respectfully submitted that said agreement, understanding and conspiracy between Emerson and Littman constitutes, as more fully detailed in plaintiff's supporting Memorandum of Law, a "per se" violation of Section 1 of the Sherman Act, whose sole objective was to restrain trade by eliminating or restricting the ability of the plaintiff to compete with the defendant dealer (Littman); and that Emerson's affirmative acquiesence to such agreement with Littman, and the admitted refusal of Emerson to make plaintiff a dealer of its ceiling fan line or to sell said fans to plaintiff (to comply with Littman's insistence and requirement that Emerson not sell to the plaintiff) constituted acts in furtherance of said unlawful conspiracy.

WHEREFORE, plaintiff respectfully prays for the entry of an Order granting plaintiff Summary Judgment against the defendants on Count I of plaintiff's Complaint, as it relates to the issue of liability, and reserving the issue of damages for future determination by this Court.

Dated: August 27, 1990.

Appendix M

Respectfully submitted,
A-ABART ELECTRIC SUPPLY, INC.,
plaintiff

By: s/ Bernard M. Kaplan
One of Plaintiff's attorneys

Bernard M. Kaplan
John W. Boyles
RUBEN, KAPLAN & ROSEN
4711 Golf Road, Suite 403
Skokie, IL 60076
(708) 679-6100

Appendix M

PROOF OF SERVICE

The undersigned, being first duly sworn on oath, deposes and says that he served a copy of Plaintiff's Amended Motion For Summary Judgment Against The Defendants On The Issue Of Liability On Count I Of Plaintiff's Complaint, and Plaintiff's Memorandum Of Law In Support Thereof, on the following:

Robert L. Stout, Jr.
Latham & Watkins
5800 Sears Tower
Chicago, IL 60606

Andrew B. David
Sugar, Friedberg & Felsenthal
30 North LaSalle St.
Chicago, IL 60602

on the 28th day of August, 1990 before the hour of 5:00 p.m., by placing a copy thereof in properly addressed and stamped envelopes and deposting said envelopes in the U.S. postal depository at 4711 Golf Road, Skokie, Illinois/or by personal service to each of the above parties on the 28th day of August, 1990.

s/ Bernard M. Kaplan

SUBSCRIBED AND SWORN
to before me this
21st day of August, 1990.

s/ Anita M. Frankel
NOTARY PUBLIC

APPENDIX M-1 — EXCERPTS OF EVIDENCE DEPOSITION OF RICHARD E. WEBER (PAGES 21-28, 47-49), THE THEN SALES MANAGER OF EMERSON ELECTRIC TAKEN ON AUGUST 4, 1990 (PLAINTIFF'S EXHIBIT 4)

[21] * * *

Q. (by Mr. Kaplan) And the K-55 motor was an integral part of the approach to selling of the new fan, am I correct?

A. They did not have that motor at that time, no.

Q. All right.

A. But there was also more involved than that. Emerson only had a four-bladed fan. The market was now going with five-bladed fans. They did not have those. They put new housings on, new blades, new glossy blades. There was a lot of changes. Not just the motor.

Q. How did the pricing of the new Emerson ceiling fan line that you have talked about, how that compare with the pricing, if you know, of the Casablanca line of fans?

A. It would be priced under Casablanca. Slightly under. Within, oh, depending upon the model, was anywhere from I would say roughly twenty-five to fifty to seventy-five dollars.

Q. Less?

A. Yes. To a dealer.

Q. To a dealer. And then approaching the dealers was that differential in price a sales factor in your attempting to persuade a dealer to buy your line of [22] fans?

MR. STOUT: I will object. I don't think it is at all clear what you mean by "a sales factor."

MR. KAPLAN: Let's find out if he doesn't understand.

MR. STOUT: The question is vague. If Mr. Weber understands it he can answer.

MR. KAPLAN: He has a better understanding than you, Counsel.

A. It was a selling factor because Emerson's name is well-known throughout the United States and the world.

Q. (by Mr. Kaplan) What about the price factor?

A. The price factor would enable a dealer such as Mr. Malik or others to sell the fan at a good profit margin and say that it's as good or similar to Casablanca and somewhat move up into the low and or Casablanca pricing; therefore they would be able to take, since there was a fifty or so dollars difference, they would make the entire margin and sell it at the bottom end.

Q. Now, when Emerson set up a schedule of pricing on the new ceilings fans, did you play a role in that?

[23] A. Somewhat, yes.

Q. In terms of determining what the prices would be?

A. Somewhat, yes. Just input into it; yes, it was a good decision to price them in this range because we could make additional profit; they fit into that part of the market.

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Q. All right. Would I be correct in saying that one of the selling features of the Emerson fan is that it afforded the dealer or the distributor a greater markup potential?

A. It could depending upon the distributor. Some distributors, like Mr. Malik, already had Casablanca, which allowed him to offer others. Other distributors only had cheap fans and couldn't get into that market and different things. It's kind of hard to answer.

Q. What about, for example, your Premier line of Emerson fans?

MR. STOUT: Objection. You mean Premium?

Q. (by Mr. Kaplan) The Premier line.

A. Premier line?

MR. STOUT: You can answer the question.

Q. (by Mr. Kaplan) The Premium line.

A. I don't know what the "Premier" line is.

[24] Q. The Premium line.

A. Premium line? That's the line that we have basically been talking about. That's the line that fit into the niche right directly under Casablanca.

Q. Do you know of your own knowledge whether the typical markup available to a dealer selling the Premium line of Emerson

fans would be greater, for example, than the markup of comparative Casablanca fans? If you know.

MR. STOUT: I will object. Number one, I don't know what "typical markup" means. And, number two, I don't think there's a foundation for that question. I object as to form and foundation.

A. It's kind of an unusual question but I will try to answer it for you.

Q. (by Mr. Kaplan) Go ahead.

A. Emerson's price was a new product, so you could add more profit onto it. Casablanca's lowest priced fan, I think it's the Delta II, I guess is the one we would be talking about, had been on the market for a number of years and there had been a lot of competition on it. Casablanca would not change their price structure, so the only way that a dealer could make inroads or get more market share was to lower his profit margin on that product. And that's what had been [25] happening. And since that was sort of the median range where most people bought fans, then a dealer would make less profit selling one of those fans than if he could sell an Emerson Premium fan, which he would have purchased for less, and basically say it's very similar to Casablanca and has five blades, has the same basic motor, and you can sell it for the low end price of the Delta II, therefore the dealer would make, should make a considerably greater markup.

Q. Okay. would it be correct tp say the statement you just made outlining those various features were statements that you as sales manager when you — when you talked to potential dealers that those factors were pointed out to the potential dealers just

as you pointed out the same today?

A. Yes, they are basically true selling points which could be construed by looking at the prices that Emerson had, and those dealers which sold Casablanca would know what they were paying for it and how little margin they were making, so for them it became a quick matter for them to evaluate; yes, I can make more selling one Emerson versus one Casablanca.

Q. You pointed that out, did you not, as sales manager —

A. Yes.

[26] Q. — to the various dealers that you were attempting to get to take the Emerson line?

A. Yes.

Q. Okay. When did you first meet Mr. Malik of A-Abart?

A. I don't know the exact date, because I don't remember all those things, but it was the day that Mr. Ippolito and I went in to see him, whatever that date is on the record. It was only one time.

Q. Was it September or October?

A. I don't remember. It's recorded as to what that date was. That was the only time that I have ever met him personally.

Q. And who was present? Was that at his store?

A. Yes, sir.

Appendix M-1

Q. And the store was on Fullerton Avenue?

A. Yes, sir, as I remember.

Q. Who were the people present?

A. Mr. Ippolito; myself; Mr. Malik; another gentleman.

Q. Dave Lang?

A. Dave someone.

Q. All right. Mr. Ippolito at that time had just come aboard as a new sales rep in the Chicagoland area for Emerson, am I correct?

[27] A. Right.

Q. What was said at that meeting by yourself, Mr. Ippolito, Mr. Malik and Mr. Lang, do you remember?

MR. STOUT: I will object to the compound question. You've got several different people, why don't you ask him one by one.

Q. (by Mr. Kaplan) What if anything was said at that meeting by you?

A. In my case it was mainly a presentation of the fan program, which Emerson had published a copy of a quotation which we had drawn up for Mr. Malik giving him some incentive reasons, discounts and quantity pricing information, and explaining to him the details of the new fan, what it would look like, how it could be used to sell under Casablanca pricing and

increase their sales and how it would basically fit into the market. The other thing that we had told him was we had talked to Lighthouse Lighting and that gentleman was interested in knowing what Mr. Malik's decision would be because they apparently were close. And basically sales information regarding the fan, the fact it would have five blades and glossy and details of it.

Q. Now, was there any reason why you or Mr. Ippolito approached A-Abart?

A. Yes. It was my job to secure distribution, [28] limited distribution or best distribution in each city in the United States. By hiring Mr. Ippolito, he was my local expert, he was the person who knew who were the key players in the Chicago market. Mr. Ippolito deals mainly with lighting showroom type people or fan dealers' and he had dealt with Mr. Malik previous to that so him and I put together what we call a plan of action as to which key players would fit together and give us coverage of the Chicago market and achieve our sales goals.

Q. Mr. Ippolito recommended that you attempt to get A-Abart into the fold, right?

A. Yes, sir.

MR. KAPLAN: I ask that this be marked as Exhibit No. 3. This is a brochure of Emerson with a fan program marked A-Abart and attached to it is a business card of Mr. Weber, folder and four pages along with a business card.

(Plaintiff's Exhibit 3 was marked for identification.)

Q. Mr. Weber, I show you Plaintiff's Exhibit No. 3 and

ask you if this is the brochure you presented to Mr. Malik on the occasion we are talking about?

A. Appears to be it, similar to our folders and our information.

[47] * * *

The broader base would be advantageous for the long term goals of Emerson. That's what I agreed with because that's what Mr. Ippolito and I were going with.

Littman offers a quick fix but puts all our eggs in one basket. Yes, I agree with that.

We have a chance to set up a strong base for the future. That is true. That's what we were going for.

By 12-10-88 90 percent of our verbal commitments will be in the fold. That is a — I don't know. We had no idea of knowing whether that would be true or not true. Mr. Ippolito and I were attempting at this time to convince Mr. Butts and Mr. Sly that our approach to this market was better and that we could do this, so some of this might have been sales hype, if you want to say it that way, on our part.

If that occurs we cannot afford to sell Littman. That's just a comment from Mr. Ippolito. It doesn't apply to anything. He doesn't know whether he could afford or not afford anything.

Q. (by Mr. Kaplan) All Right. I take it from your testimony that Mr. Sly and Mr. Butts disagreed with [48] your approach to the marketing of the Emerson fan line, is that correct?

Appendix M-1

MR. STOUT: Object to form, his "approach." He testified about a lot of different issues.

MR. KAPLAN: He has talked about how he wanted to set up the distribution.

Q. (by Mr. Kaplan) And you stated that you and Mr. Ippolito were trying to convince Mr. Butts and Mr. Sly; would you explain that, please?

MR. STOUT: I object to the form of the question. I don't think it is at all clear what you are asking.

A. I think I can clarify it for you. In the Chicago market we had a disagreement because of —

Q. (by Mr. Kaplan) Who is "we"?

A. Mr. Sly and Mr. Butts and I had a disagreement in the Chicago market because of this condition with Littman and our going with the other approach. I set up the distribution, the representatives, in every other part of the country and had no objections in any way, shape or form from Mr. Butts or Mr. Sly. I had that authority. In Chicago my approach was I did not want to put my eggs all into one basket and I felt it would be better to go on a broader base distribution. As I said, we disagreed. We had done this in all the other cities; we had not had the situation to arise where one dealer was so strong to penetrate the whole market as in the case of Littman. So we did not have that condition proposed to us anyplace else. In this case, I had been in the business a long time, in the specific distribution/rep agency/marketing end of it; Mr. Butts and Mr. Sly were somewhat new to that. My idea, I would feel it would be better to do it

this way. That was my opinion. They disagreed. They felt it would be better to go with one dealer, one shipment, one payment, one guy that does all the advertising and everything else. It was a decision between two people, two groups, them and us, them and me.

Q. All right. You had various discussions with Mr. Sly and Mr. Butts regarding that, did you not?

MR. STOUT: I will object to the form of the question.

A. Regarding what?

Q. (by Mr. Kaplan) Regarding what you just testified to. No sense repeating it again.

MR. STOUT: Object to the form.

You can answer if you understand the question.

APPENDIX M-2 — WRITTEN MEMORANDUM OF JAMES J. IPPOLITO (CHICAGO AREA SALES REPRESENTATIVE OF EMERSON ELECTRIC) DATED NOVEMBER 20, 1988 (PLAINTIFF'S EXHIBIT NO. 6)

(Omitted Here But Submitted Separately As Lodging Appendix)

APPENDIX M-3 — LETTER DATED DECEMBER 5, 1988, FROM DAVID L. BUTTS, DIRECTOR OF MARKETING AND SALES OF EMERSON ELECTRIC ADDRESSED TO BENSON LITTMAN (PLAINTIFF'S EXHIBIT NO. 6)

EMERSON
Builder Products

December 5, 1988

Mr. Benson Littman
LITTMAN BROS.
730 N. Franklin, Suite 710
Chicago, IL 60610

Dear Benson:

Emerson would like to thank you and Dan for taking the time to visit our St. Louis office. We are excited about the potential Littman Bros. has with the Emerson fan line. Littman will be our primary Chicago/Milwaukee dealer. The number of dealers will be restricted to allow everyone to maintain margins.

Enclosed is a copy of your program and the P.O.s from the initial order. You will receive 20 binders towards the end of this week per your request. All other literature is being shipped to the stores.

We are looking forward to a long and profitable relationship.

Sincerely yours,

s/ David L. Butts
David L. Butts
Director, Marketing and Sales
DLB:dc
Enclosure

APPENDIX M-4 — INTER-OFFICE MEMORANDUM DATED DECEMBER 19, 1988 ADDRESSED TO PAT SLY OF EMERSON ELECTRIC (PLAINTIFF'S EXHIBIT NO. 9)

SKIL

DATE: December 19, 1988
FROM: W.L. Davis

INTER-OFFICE COMMUNICATION

TO: Pat Sly cc: Ernie Lovelady

SUBJECT: Littman Brothers

I just spoke with Bruce Littman who called as a follow up since we had not spoken since we met at the dinner last August. He wanted to let me know that he was delighted with the way things have progressed with you and your people on the Emerson ceiling fan program. Although they were disappointed initially with our unwillingness to sell them for their new St. Louis stores, he and his sons have now come to realize how helpful your limited distribution approach will be to them in Chicago and Milwaukee. Bruce's comment is that between Littman and Crest, Emerson will be the number one dealer in the Chicago market by the end of next season. He went on to say that because Casablanca has no profit capability, if you continue to improve your product line at the top end as you have outlined to them, Emerson has tremendous opportunities.

In essence he is buying off on your stated strategy 100%. Basically it worked for Skil. Wouldn't it be great if it would work for ceiling fans!

WLD: pak

APPENDIX N — PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE DEFENDANT LITTMAN BROS. ON COUNT III OF PLAINTIFF'S COMPLAINT AS IT RELATES TO ISSUE OF LIABILITY FILED OCTOBER 23, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 88C10759

Judge Leinenweber

A-ABART ELECTRIC SUPPLY, INC.,

Plaintiff,

vs.

EMERSON ELECTRIC CO., et al.,

Defendants.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE DEFENDANT, LITTMAN BROS. ENERGY SUPPLIES, INC., ON COUNT III OF PLAINTIFF'S COMPLAINT, AS IT RELATES TO THE ISSUE OF LIABILITY

Now comes A-ABART ELECTRIC SUPPLY, INC., plaintiff herein, by RUBEN, KAPLAN & ROSEN and JOHN W. BOYLES, its attorneys, pursuant to Rule 56 of the Rules of Civil Procedure for the United States District Courts, respectfully moves the court for the entry of Partial Summary Judgment in favor

of the plaintiff and against the defendant, LITTMAN BROS. ENERGY SUPPLIES, INC., on Count III of plaintiff's Complaint, as it relates to the issue of liability. In support of which Motion the plaintiff realleges the allegations and factual averments, and supporting Exhibits set forth in:

> (a) Plaintiff's Amended Motion For Partial Summary Judgment on Count I of Plaintiff's Complaint, together with the exhibits attached thereto.
>
> (b) Plaintiff's Memorandum of Law in support of Plaintiff's Amended Motion for Partial Summary Judgment On Count I of Plaintiff's Complaint, including the Exhibits attached thereto; and
>
> (c) Plaintiff's Reply Memorandum in Support of Plaintiff's Amended Motion for Partial Summary Judgment on Count I of Plaintiff's Amended Complaint and in response and opposition to the Cross-Motions for Summary Judgment of the defendants, EMERSON ELECTRIC CO. and LITTMAN BROS. ENERGY SUPPLIES, INC., including the Exhibits attached thereto;

and states as follows:

Count III of plaintiff's Complaint (paragraph 15 thereof) charges LITTMAN with the commission of two (2) separate and distinct, but related, torts, in relationship to the plaintiff, viz. (1) the tort of interference with contractual relations, and (2) the tort of interference with *prospective* economic advantage, to-wit

as follows:

> "15. That in and by said conduct upon the part of LITTMAN alleged in paragraphs 13 and 14 of Count III herein (which realleges paragraphs 13 and 14 of Count I of Plaintiff's Complaint), the defendant, LITTMAN, maliciously and tortiously interferred with plaintiff's existing and prospective contractual and economic relationship with EMERSON, and has caused EMERSON to wrongfully refuse to deal with and sell EMERSON ceiling fans to the plaintiff, to the damage of the plaintiff."

The evidence is undisputed that the plaintiff, in the Fall of 1988, had a reasonable expectancy of entering into a valid business relationship with EMERSON as a dealer and distributor of EMERSON's new line of ceiling fans is crystal clear. This is reflected by the following undisputed facts:

> (1) That on or about the 18th day of October, 1988, EMERSON, through Richard E. Weber, its then national sales manager, solicited the plaintiff, at the latter's office in Chicago, Illinois, to purchase and become a distributor and dealer of a new line of ceiling fans being manufactured by EMERSON.
>
> (2) That at said meeting, EMERSON, acting through its said national sales manager, presented to Mr. Malik of the plaintiff company a brochure, which had been prepared in advance by EMERSON, setting forth the prices and terms at which EMERSON was agreeable to selling its

ceiling fan line to plaintiff.

(3) That at said meeting, the plaintiff, through Mr. Malik, its president, agreed to become a dealer and distributor of EMERSON's new line of ceiling fans, and EMERSON's acting said national sales manager, Mr. Weber, agreed to sell its line of ceiling fans to the plaintiff at the prices set forth in EMERSON's Distributor Price Sheets.

(4) That in furtherance of said agreement and understanding, EMERSON furnished the plaintiff with various brochures, literature and other promotional materials, and the plaintiff, at the request of EMERSON's sales representative filled out and furnished to EMERSON a "new Account Confidential Credit Information" Sheet, and a sales tax information sheet. In addition, EMERSON sent and delivered to the plaintiff a number of sample EMERSON fans, and on November 18, 1988, the plaintiff placed and transmitted to Jim Ippolito, the local sales representative of EMERSON, an initial ceiling fan purchase order (on a form that had been provided by EMERSON) for some 552 EMERSON ceiling fans and related accessories.

(5) Thereafter, on or about December 7, 1988, Mr. Malik, the President of the plaintiff company, was advised in person by said Jim Ippolito, the sales representative of EMERSON, that although said order had been accepted by EMERSON, that he was now informed by EMERSON that EMERSON

was rejecting the purchase order and had decided not to sell to plaintiff's competitor, LITTMAN, to the exclusion of the plaintiff.

See plaintiff's Exhibit No. 1 through 5 inclusive attached to and made a part of plaintiff's Complaint in this cause.

That LITTMAN had knowledge of plaintiff's reasonable expectancy of becoming a dealer and distributor of the EMERSON ceiling fan line is also abundantly clear from the evidence adduced in this cause and is evident as early as September 8, 1988 when Benson Littman, the president of LITTMAN queried EMERSON as to whether EMERSON intended to sell to plaintiff (A-ABART) and advised EMERSON that it would not buy from EMERSON if EMERSON sold its ceiling fan line to the plaintiff, and thereafter again including the meeting of November 30, 1988 in St. Louis when LITTMAN, through said Benson Littman, made it bluntly clear that a condition of LITTMAN buying from EMERSON was that EMERSON would not sell its ceiling fan line to the plaintiff. The evidentiary details concerning the aforesaid has heretofore been covered in detail in plaintiff's Amended Motion for Partial Summary Judgment on Count I of Plaintiff's Complaint and plaintiff's supporting memorandum briefs herein.

That LITTMAN intentionally interfered so as to prevent plaintiff's reasonable expectancy of a valid business relationship with EMERSON is also crystal clear. This it did by entering into the agreement, understanding and conspiracy with EMERSON, wherein as a condition of LITTMAN buying from EMERSON, EMERSON agreed not to sell its ceiling fan line to the plaintiff. The evidentiary facts relating to the same have heretofore been set forth and detailed in plaintiff's Amended Motion for Partial Summary Judgment on Count I of plaintiff's Complaint and

plaintiff's supporting memorandum briefs herein, and need not be rehashed herein.

In support of the within plaintiff's Motion for Partial Summary Judgment on Count III of plaintiff's Complaint, plaintiff attaches hereto and files herein its Memorandum of Law which briefly and to the point succinctly sets forth the evidentiary facts necessary to establish a cause of action for tortious interference with prospective economic advantage.

Plaintiff respectfully submits that the undisputed evidence adduced in this cause clearly establishes that the defendant, LITTMAN, in relation to the plaintiff has been guilty of tortious interference with plaintiff's prospective economic advantage, to plaintiff's damage.

WHEREFORE, plaintiff respectfully moves this Court for the entry of partial summary judgment in favor of the plaintiff and against the defendant, LITTMAN BROS. ENERGY SUPPLIES, INC. on Count III of plaintiff's Complaint, on the issue of liability, and reserving the question of damages for future determination by this Court.

RUBEN, KAPLAN & ROSEN
and JOHN W. BOYLES

By: s/ Bernard M. Kaplan
Attorneys for A-ABART
ELECTRIC SUPPLY, INC.,
plaintiff

Appendix N

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APPENDIX O — RELEVANT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1 provides, in pertinent part, as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal.

Rule 11 of the Federal Rules of Civil Procedure, provides, in pertinent part, as follows:

> . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Appendix O

Paragraph 7 of the Advisory Committee Notes to the 1983 Amendment of Rule 11 provides, in pertinent part, as follows:

> The rule is not intended to chill an attorney's enthusiasm or creativity in pursuring factual or legal theories.

Rule 38 of the Federal Rules of Appellate Procedure for the United States Court of Appeals provides, in pertinent part, as follows:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

The First Amendment to the Federal Constitution provides, in pertinent part, as follows:

> Congress shall make no law . . . abridging the freedom of speech, or the press . . . .

The Fifth Amendment to the Federal Constitution provides, in pertinent part, as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

No. 92-138

Supreme Court, U.S.
FILED
AUG 20 1992
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1992

A-ABART ELECTRIC SUPPLY, INCORPORATED, an Illinois corporation, and RUBEN, KAPLAN & ROSEN AND JOHN W. BOYLES, counsel for A-Abart Electric Supply, Incorporated,

Petitioners,

vs.

EMERSON ELECTRIC COMPANY, (BUILDER PRODUCTS DIVISION), a Missouri corporation and LITTMAN BROTHERS ENERGY SUPPLIES, INC., an Illinois corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT LITTMAN BROS.' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Summary of the Proceedings Below

On December 23, 1988, petitioner A-Abart Electric Supply, Inc. ("A-Abart") filed a three-count complaint against respondents Emerson Electric Co. ("Emerson") and Littman Bros. Energy Supplies, Inc. ("Littman Bros.").[1] Count I of the complaint alleged that Emerson, a manufacturer of electric ceiling fans, and Littman Bros., a ceiling fan dealer that competes with A-Abart, entered into an agreement whereby Emerson would sell its ceiling fans to Littman Bros. and not to A-Abart. A-Abart asserted that this constituted a violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

---

[1]Neither Littman Bros. nor Emerson has a parent corporation or subsidiaries, nor is Littman Bros. aware that A-Abart has a parent or subsidiary.

In Count II of its complaint A-Abart alleged that Emerson had breached a purported contract to sell 552 ceiling fans and related accessories to A-Abart. In Count III A-Abart alleged that Littman Bros. had tortiously interfered with A-Abart's existing and prospective economic relationship with Emerson.

A-Abart initiated extensive discovery, none of which was directed toward the issue of market power, a necessary element of any rule of reason analysis. Thereafter, A-Abart moved for summary judgment on Count I of the complaint, predicated on its contention that the alleged agreement between Emerson and Littman Bros. was per se violative of Section 1 of the Sherman Act. Littman and Emerson filed cross-motions for summary judgment as to all counts of the complaint. Neither in its motion nor in response to the cross-motions

did A-Abart argue that a rule of reason analysis applied to Emerson's and Littman's conduct.

On November 30, 1990, the district court issued a Memorandum Opinion and Order denying A-Abart's motion for partial summary judgment and granting Littman's and Emerson's cross-motions for summary judgment. Accordingly, the district court entered a judgment dismissing the action in its entirety with prejudice.

The district court subsequently granted Emerson's and Littman Bros.'s motions for sanctions under Rule 11 of the Federal Rules of Civil Procedure. The district court found that A-Abart had violated Rule 11 by, among other things, failing to cite the Supreme Court's controlling decision in Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) in its opening brief. In

addition, the district court noted that once respondents had cited Sharp in their briefs, A-Abart attempted to distinguish it on frivolous grounds, and quoted cases and language from the dissenting opinion in that case as if they were taken from the majority opinion.

A-Abart appealed to the United States Court of Appeals for the Seventh Circuit from both the dismissal of its action and the sanctions imposed on it.[2] As it had before the District Court, A-Abart argued that the respondents' conduct was a per se violation of Section 1 of the Sherman Act.

On February 27, 1992, the Court of Appeals rendered its opinion affirming the decision of the district court in all

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[2]A-Abart did not appeal from sanctions imposed on it under Rule 37(b)(2) of the Federal Rules of Civil Procedure for failing to comply with an order of the district court relating to discovery.

respects. 956 F.2d 1399 The Court of Appeals recognized that Sharp controlled the antitrust issue, Id. at 1403, that the challenged conduct was not subject to the per se rule, Id., and that A-Abart had not argued for the application of the rule of reason standard. Id.

The Court of Appeals assessed the costs of the appeal, including attorneys fees, against A-Abart's counsel, in accordance with Rule 38 of the Federal Rules of Appellate Procedure. In addition to concluding that the arguments advanced by A-Abart on appeal were as frivolous as the claims it had made before the district court, the Court of Appeals sanctioned petitioners because of their misleading citations to Sharp and other decisions.

On April 23, 1992, the Court of Appeals denied petitioners' request for a rehearing.

B. Statement of Facts[3]

Littman and A-Abart both own and operate a series of retail stores in the Chicago area from which they sell electric ceiling fans. Emerson is a manufacturer of ceiling fans.

In 1988, Emerson introduced a new line of ceiling fans to the market. On September 8, 1988, representatives from Emerson met with Littman to present Emerson's new line of fans to Littman.

During their September 8 meeting, Littman asked Emerson which stores were going to be carrying Emerson's new fan line in Chicago. The Emerson representatives informed Littman

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[3]These facts are drawn from the statements of material fact as to which there is no genuine issue which were filed by Littman and Emerson in accordance with Local Rule 12(m) of the United States District Court for the Northern District of Illinois. A-Abart did not file a response to either 12(m) submission, meaning that it admitted all of the facts set out by Littman and Emerson. See Local Rule 12(n) of the United States District Court for the Northern District of Illinois.

that Emerson intended to speak with all of the retailers in the Chicago area before making a decision as to the stores to which it would sell its fans.

At the September 8 meeting, Littman explained to Emerson that it would not be interested in the new Emerson fan line if Emerson sold its products to A-Abart. Littman stated that it did not want to commit its financial resources to introducing Emerson's product to the Chicago market if there was not going to be enough of a market share for it.

A-Abart's first discussion with Emerson did not occur until mid-October, 1988. A-Abart did not fill out a written purchase order for Emerson fans until mid-November, 1988. The order was never filled.

Emerson adopted a limited distribution strategy for its new fan line, intending to restrict the number of dealers in each market

in which it would sell its fans. In Chicago, Emerson concluded that A-Abart and Littman had numerous stores in close proximity of each other, and attracted similar customers. In conformity with its strategy, Emerson decided that it would sell to A-Abart or Littman, but not both. Emerson subsequently made a decision to sell to Littman because Littman had more stores than A-Abart, devoted more money to advertising, would buy more fans, and hence would better enable Emerson to compete with other manufacturers.

Littman also had a ceiling fan store in St. Louis, and sought to carry the new line of Emerson fans in that store. However, because Emerson had already established its distribution network in St. Louis, and consistent with its limited distribution policy, Emerson would not sell fans to Littman for its St. Louis store.

Emerson and Littman met in St. Louis on the afternoon of November 30, 1988, to solidify their relationship. Emerson had made its decision to sell its fans to Littman, and not to A-Abart, prior to this November 30 meeting.

SUMMARY OF ARGUMENT

This Court's decision in Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) is dispositive of the antitrust issue involved in this matter.[4] Sharp is not nearly as narrow as A-Abart asserts. Furthermore, even if Sharp were construed narrowly, the facts of the instant case are so similar to those involved in Sharp

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[4]A rule of reason case was never asserted by A-Abart in either the district court or before the Seventh Circuit, nor was any evidence ever developed by A-Abart in support of such an analysis. While A-Abart seeks to raise this issue before this Court, the time has long since passed for it to make such an argument.

that this case presents no novel or unresolved issues which would justify further review.

The imposition of sanctions against petitioners in both the district court and the Court of Appeals was consistent with the applicable rules of civil and appellate procedure. The frivolous nature of A-Abart's claim in light of the decision in Sharp, coupled with petitioners' misleading citations from the dissenting opinion in Sharp, provided more than ample justification for the imposition of sanctions.

ARGUMENT

I

BUSINESS ELECTRONICS CORP. v. SHARP ELECTRONICS CORP. CONTROLS THE ANTITRUST ISSUE PRESENTED BY PETITIONERS

In Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988), this Court clearly and unequivocally enunciated the

standard by which a vertical nonprice restraint would be viewed in the context of a claim under Section 1 of the Sherman Act, 15 U.S.C. §1. Seeking to avoid drawing "formalistic distinctions," Id. at 726, this Court concluded that vertical restraints which do not involve setting prices would not be treated as per se illegal.

In an effort to pique this Court's interest in its case, A-Abart argues that Sharp was intended to apply only to the specific facts then before the Court. It refers to the penultimate paragraph of the Court's opinion ["In sum, . . . a vertical restraint trade is not illegal per se unless it includes an agreement on price or price levels"] as mere dictum, even though that paragraph expressly purports to summarize the Court's holding. A-Abart apparently contends that the distinction between a decision to

terminate an existing dealer (Sharp) and the decision to refuse to appoint a dealer (the instant case) -- both at the behest of a competitor/distributor -- is meaningful from a per se standpoint. In fact, however, the distinction is meaningless. There is no language in the Court's opinion that recognizes the potential significance of such a distinction, nor is such a conclusion consistent with the logic of this Court's opinion.

In Sharp, this Court recognized that vertical nonprice restraints can be pro-competitive, by stimulating interbrand competition. Id. at 724-25. Because "per se rules are appropriate only for that conduct which is manifestly anti-competitive," and because vertical nonprice restraints can enhance interbrand competition, this Court refused to mandate that any type of vertical,

nonprice restraint be considered per se illegal. Rather, by requiring a rule of reason analysis for cases involving vertical nonprice restraints, the Court allowed the pro- or anti-competitive nature of each alleged restraint to be considered on its own facts.

Petitioner's narrow interpretation of Sharp is inconsistent both with the cases that led to this Court's consideration of Sharp, and those which have followed. Sharp was expressly intended to resolve a split among the Circuits concerning the "proper dividing line between the rule that vertical price restraints are illegal per se and the rule that vertical nonprice restraints are to be judged under the rule of reason." Id. at 720. In resolving the conflict among the Circuits, this Court did not distinguish between dealer termination cases, such as Sharp, and cases

which involved the refusal of a manufacturer to grant a distributorship.[5] For purposes of antitrust analysis there is no reason to apply a rule of reason analysis to one group of vertical, nonprice restraint cases and a per se analysis to the other, since in both situations the challenged conduct might be pro-competitive.

Those courts of appeal which have considered vertical restraints since this Court's decision in Sharp have not viewed Sharp in the narrow fashion that A-Abart now urges. For example, in Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575 (11th Cir. 1988), the Court of Appeals found cases involving dealer terminations and those involving

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[5]For instance, Westman Commission Co. v. Hobart Int'l., Inc., 796 F.2d 1216 (10th Cir. 1986), involved a manufacturer's refusal to grant a distributorship to the plaintiff, based upon the urging of one of the manufacturer's other customers.

refusals to deal to be equivalents for purposes of a claim under Section 1 of the Sherman Act. Id. at 1583. Similarly, in The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988), the Court of Appeals drew no distinction between terminations and refusals to deal. Rather, it recognized that Sharp, as well as this Court's antitrust opinions which preceded Sharp, stood for the proposition that "concerted vertical nonprice restraints are scrutinized for illegality under antitrust's rule of reason." Id. at 1154.

Because the antitrust issue involved in the instant case has already been resolved by this Court, there is no purpose to be served by a further review of A-Abart's claims. Furthermore, even if Sharp were viewed narrowly, the facts alleged by A-Abart are so similar to those which the Court considered in

Sharp that further review would not serve to illuminate a more narrow reading of Sharp.

Both cases involve a distributor which stated that it would not carry a manufacturer's product if the manufacturer sold to one of the distributor's competitors. In Sharp, the distributor which imposed the condition on the manufacturer did so as a result of its competitor's price-cutting and free-riding. In the instant case, respondent Littman Bros. was unwilling to spend the funds necessary to introduce Emerson's new product to the marketplace if it was not assured of having a sufficient market share to be able to recoup the expenses it expected to incur. In neither case was there an agreement alleged between a group of distributors. In neither case was there an agreement as to the prices the distributor would charge. In both instances, interbrand competition benefitted

from the efforts of the distributor, enabling the respective manufacturers to better compete with their competitors by retaining the efforts of the stronger distributors.

If anything, the facts in Sharp were more egregious than the instant case. In Sharp, the plaintiff had been an existing distributor. The demands its competitor placed on the manufacturer caused the manufacturer to terminate an existing relationship -- a relationship in which the terminated distributor had made an investment over a period of years. Moreover, the termination of the plaintiff left only one distributor in the region, whereas in the instant case Littman Bros. is but one of a number of Emerson's distributors in the Chicago area. If the conduct in Sharp was not per se illegal, then certainly respondents' conduct here cannot be considered illegal per

se. There is no basis for a further review of this case. The petition for the issuance of a writ of certiorari should be denied.

II

THERE IS NO REASON TO REVIEW THE SANCTIONS IMPOSED ON PETITIONERS

Petitioners' request that this Court review the sanctions imposed on them by both the district court and the Court of Appeals is made without citation to a single case. Remarkably, petitioners also refuse to acknowledge why it was that they were sanctioned.

Before the district court, A-Abart did not even cite Sharp in the brief it filed in support of its motion for partial summary judgment. Instead, among the cases on which A-Abart relied was a 1978 district court decision, which A-Abart did not reveal had been reversed on appeal. After the

respondents had cited Sharp in opposition to A-Abart's motion, A-Abart "quoted cases and language from the dissent in Sharp as if from the majority opinion." Transcript of Proceedings of 2/20/91, attached as Appendix "H" to the Petition for Writ of Certiorari.

Despite having been sanctioned by the district court for either trying to "buffalo the court" or not doing their homework, see Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1082 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988), petitioners engaged in equally deplorable conduct before the Court of Appeals. The Seventh Circuit was not only bothered by the fact that the arguments advanced by petitioners were frivolous, but also by petitioners' dishonesty in their citation of authority:

> We have other reasons for awarding damages and costs in this case. A-Abart, in its brief to this court, calls our attention to Cernuto, Inc.

> v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979) and notes that it was cited by the Supreme Court in Business Electronics, 485 U.S. at 742 n.4, 108 S.Ct. at 1529. But A-Abart failed to disclose that this citation was from the dissenting opinion in Business Electronics. Moreover, it is clear that the Supreme Court intended to overrule Cernuto in Business Electronics; the Court cited it as one of the cases representing a split in the circuits that it settled in Business Electronics. Cernuto was quite emphatically on the losing side of that split. Business Electronics, 485 U.S. at 720 n.1, 108 S.Ct. at 1517. Nevertheless, the appellants lead their reply brief with a citation to Cernuto.

956 F.2d at 1407. The fact that petitioners advanced a legal position which was contrary to dispositive authority, coupled with their misconduct in the manner in which they argued the appeal, justified the imposition of sanctions under Rule 38 of the Federal Rules of Appellate Procedure. Romala Corp. v. U.S., 927 F.2d 1219, 1222 (Fed. Cir. 1991).

It is beyond peradventure that both the district court and the Court of Appeals properly exercised their discretion in sanctioning petitioners. This was not an instance where counsel were penalized for advancing a novel issue of law or because they zealously represented their client. Petitioners' continued refusal to admit why they were sanctioned is symptomatic of the type of conduct which caused them to be sanctioned in the first instance.

Unquestionably, A-Abart's counsel were entitled to advocate their clients' position. That license, however, did not allow them to ignore precedent or miscite this Court's opinion. The lower courts' imposition of sanctions was consistent with the parameters of controlling law, and there is no basis for this Court to review those decisions.

CONCLUSION

Based on the foregoing, respondent Littman Bros. Energy Supplies, Inc. respectfully requests that the petition for writ of certiorari filed by A-Abart Electric Supply, Inc. and its attorneys be denied in it entirety. Furthermore, because the petition is so completely frivolous, Littman Bros. requests, in accordance with Supreme Court Rule 42.2, that it be awarded just damages and costs against both A-Abart and its attorneys for having to respond to the petition.

Respectfully submitted,

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